

L

A P P E N D I X,
ALTERATIONS and ADDITIONS
T O
THE SECOND EDITION,
O F
R E P O R T S O F C A S E S
A R G U E D and D E T E R M I N E D
I N T H E
High Court of Chancery:
B E G I N N I N G W I T H
Trinity Term, 18 Geo. 3. A. D. 1778,
A N D E N D I N G W I T H
T H E S I T T I N G S A F T E R
Trinity Term, 25 Geo. 3. A. D. 1785.

By WILLIAM BROWN, of the *Inner-Temple*, Esq;
BARRISTER AT LAW.

L O N D O N:

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A P P E N D I X

ALTERATIONS AND ADDITIONS

TO

THE SECOND EDITION

OF

REPORTS OF THE

ARGUED AND DETERMINED

High Court of Chancery

BEGINNING WITH

THIRTY YEARS AGO

AND ENDING WITH

THE PRESENT

THIRTY YEARS AGO

BY WILLIAM BROWN, CLERK

PRINTED AT LONDON

L O N D O N

Printed by A. S. ...

For E. and M. ...

TH E Reporter having, in the Second Edition of this Volume, made a few Alterations in the Text, (though not of great importance,) added several Notes and References, and annexed an Appendix of Contemporary Cases, (from the obliging communications of other Gentlemen) is induced, as a mark of respect to the Purchasers of the former Edition, to publish them separately for their use.

It was thought also, that it would be more convenient to add the Indexes of the Second Edition at length, than to publish separate ones to the Appendix and Additions: both as some variations are made in them respecting the body of the work, and from the greater facility of consulting one index than two.— The new matter is, however, distinguished by the manner of printing; and, with respect to the additional Notes in particular, will be easily found, by applying, from the reference in the index, to that to the same page in the additions.

*Pump Court, Temple,
March 8, 1790.*

ADDITIONS,

THE REPORTER having in the 2nd Edition of this
Volume made a few alterations in the List of
of great importance) added several new and interesting
noted an Appendix of Contributions to the List of
contributions of other persons, and a list of
respect to the List of the names of the persons
entirely for their use.

It was thought also that it would be more convenient to add
the names of the Editors of the various papers, and to give
space to the Appendix and a list of the names of the
those are made in them, and the List of the names of the
from the former facility of consulting one index or the other.
The new matter is now arranged alphabetically, the names of
persons; and with view to the convenience of the reader
it will be easily found by consulting the index in the
index to that to the names in the volume.

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A P P E N D I X

OF

CONTEMPORARY CASES.

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A P P E N D I X,

FLETCHER *against* ASHBURNER.

Rolls, June
1779.

JOHN FLETCHER, by his will, devised his burgage houses and free rents, in *Kendall*, and all his personal estate to trustees and the survivor, and the heirs, executors and administrators of such survivor in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife *Agnes* to enjoy the residue during her life, if she so long continued his chaste widow; and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half a guinea each to the trustees for their trouble, to pay to, and between his son *William* and daughter *Mary*, share and share alike, provided that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son *William*, and daughter *Mary*, share and share alike, equally, and in case either his son *William* or his daughter *Mary* should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them: The testator died leaving *Agnes* his widow, *William* his only son and heir at law, and *Mary* his daughter; *Agnes*, by the custom of burgage tenure, was entitled to hold the burgage houses in *Kendall* during her chaste viduity, against the disposition of her husband by will; *Mary* attained 21, but died unmarried in the life of her mother and brother. *William* was 21 at the death of the testator, and died without issue in the life of his mother, the mother died the widow of the testator, upon her death a bill was filed by the heir at law of *William* and *John* the testator, against the trustees and the personal representatives of the testator and of the widow to have a conveyance of the real estates devised by the will, to the plaintiff,

Where a real estate is ordered to be sold, and is blended with personal property, it becomes personalty and shall go accordingly.

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the heir at law. The representative of the widow, who was the sole next of kin of *William* the son, by answer, claimed the property as personal; alledging that by the direction to the trustees to sell the real estates they become as personal property, and as such, were to go to the personal representative of *William* the son who survived his sister.

The cause was heard the 11th *December* 1778, where the first objection taken was that the personal representative of *William* was not before the Court.

But the Master of the Rolls was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party, and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Madocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go to the real not the personal representative: that it was clearly the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person; that he directed it to be sold merely for the purpose of a division; that in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and from thenceforth, the son alone becoming intitled, upon the death of his mother, it was to be considered as land, they relied upon the case of *Flanagan v. Flanagan*, 8th *June* 1768, before Lord *Camden*, which was a devise of real and personal estate to trustees, in trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts, the surplus, after payment of debts, to *A.* A suit was instituted for payment of the debts, and the real estates decreed to be sold: part was sold; and afterwards *A.* died, leaving a son and daughter, the cause was revived against the son, and it being apprehended that sufficient was not sold to pay the debts a further part of the real estate was sold under the order of the Court. It afterwards proved that the money produced by the first sale was sufficient to pay the debts; the question was whether the heir, or the personal representative was intitled to this money; it was alledged by Mr. *Wilson* who cited the case, that Lord *Camden's* determination was that

that whatever quality the fund then had, such it should retain; and he decreed for the personal representative: the other cases mentioned were *Cruse v. Barley* and *Banfon*, 3 P. Wms. 20. *Digby v. Legard*, before Lord Bathurst.

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Mr. *Kenyon*, and Mr. *Chambre*, (on behalf of the defendants, the executors of the widow) contended that the testator had by his will directed the real estate, after the death of his widow, to be sold and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan v. Flanagan*, it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made and the property to be changed for payment of debts; the cases of *Digby v. Legard*, and *Cruse v. Barley* and *Banfon* were treated as inapplicable to the present case, being cases of lapsed devises, *Durour v. Motteux*, 1 Vezey, 320. and *Malrabar v. Malrabar*, *Forrester*, 79. were cited as decisive of the question in favour of the defendants.

In *June*, his Honor gave his opinion, he observed that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple v. Bindon*, 2 Vern. 536. it was determined that a husband was intitled to money to be laid out in land as tenant by the courtesy, and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have

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have been where real estates have been directed to be sold and some part of the disposition has failed; so that something has resulted to the heir at law, as in the case of *Emblyn v. Freeman*, *Pre. in Cha.* 541. and *Cruse v. Barley and Banfon*, 3 *P. Wms.* 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir at law of the testator. The case of *Durour v. Motteux*, 1 *Vez.* 320. is a strong case to the point now before the court; and if any thing could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour v. Motteux*, Lord *Hardwicke* made this a principal ground for considering the whole fund as personal estate: In the present case, it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold: both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother. There could be no election, to take the fund as land or money; for where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold; the question therefore is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir at law shall take it, as if no will had been made. The case of *Flanagan v. Flanagan*, is a strong authority that it shall be taken as personal estate, according to the will. In that case, the testatrix, *Sarah Wooley*, by will dated 28 *March*, 1749, gave and devised all her real and personal estates to *Francis Plumtree*, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof, in trust to convey the residue of the real estate, which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father *James Flanagan*, and her brother *James Flanagan*, their heirs, executors, and administrators, equally. A bill was brought, by the creditors, for sale of the real estate, to supply the deficiency of the personal estate

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estate for payment of debts; and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to *James Flanagan* the father, and *James Flanagan* the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs equally: after the decree, *James Flanagan* the son died, leaving a daughter, and a son born after his death; part of the estate was sold, and afterwards *James Flanagan* the grand-father died, leaving his grand-son his heir, and his grand-son and grand-daughter his sole next of kin: after the death of the grand-father, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was, afterwards, brought by the son of *James Flanagan* the son, claiming a moiety of the surplus, as the real estate of *James Flanagan* his grand-father, to whom he was become heir against the personal representative of his grand-father, and against the daughter of *James Flanagan* the son, who claimed a moiety as one of the next of kin of her grand-father. It was objected, that the second sale, after the death of the grand-father, was improper. The Court determined, that the second sale, actually made under the decree of the court, before the Master, could not be considered as improperly made: that there was no fraud, no practice, and that the money ought to go to the personal representative of the grand-father. The case of *Digby v. Legard* is a different question. There the testatrix (*Elizabeth Byerley*) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (*Lady Cayley*) died in her life-time. It was resolved that the devise, so far, failed totally, and should accrue to the heir at law. The language of the decree is such, that the benefit of the devise to *Lady Cayley* should accrue to the testatrix's heir at law, Mr. *Jervoice*, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore v. Scudamore, Pre. in Cha.* 543. shews that, in all cases where the dispute is between representatives, the heir, or executor, shall have the fund according to the will or contract of the persons who gave or created it. There was a case of *Ogle v. Cook*, heard 19th February 1748, which was this: Mr. *Ogle* made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widowhood, and after her

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death, or marriage, to his two daughters equally, except that the eldest was to have 1,000 *l.* more than the other: he gave the residue of his personal estate in the same way: he afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his life-time. The bill was brought by the widow, and the eldest daughter, against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son, as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only *pro tanto*, to let in the debt; and that so much of the estate as remained unsold should be sold, and that the money raised, or to be raised by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 *Vez.* 174. *Cunningham v. Moody*, where, by marriage articles, 500 *l.* was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment to the children, to be equally divided among them, if more than one, as tenants in common, in tail general, with cross remainders, and if but one, to that child in tail general, and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the 500 *l.* to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor by a second marriage filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the 500 *l.* considering it as land; and it was observed that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest, during his life, as tenant by the courtesy. In the present case, *William Fletcher*, the son, had the whole beneficial title vested in

him

him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed without costs.

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HEPBURN *against* DURAND.

20th November,
1779.

Where sums are specifically charged in the bill to have been received by the defendant, he must answer specifically to them; and it is not enough to refer to a schedule of all sums received.

ON exceptions to a Master's report disallowing exceptions to an answer, one exception was, that the defendant had not set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when received, and of whom, and on what account. The answer referred to a schedule, as containing an account of *all* sums received by the defendant. Lord *Chancellor* was of opinion, that the defendant was bound to answer specifically to the specific charges in the bill; and that it was not sufficient for the defendant to say, generally, that he had in a schedule set forth an account of all sums received by him.

ACKROYD *against* SMITHSON and Others.

Lincoln's Inn
Hall, 4th
March, 1780.

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies. Two of the residuary legatees died living the testator. These shares are lapsed, and so far as they are constituted by personal estate, shall go to the person next of kin, and so far as they are constituted of real estate, to the heirs at law.

CHRISTOPHER HOLDSWORTH, by his will, gave (*int. al.*) to the defendants *Smithson* and *Ibbetson*, their executors and administrators, 200 *l.* in trust to put the same out at interest, and to apply the interest in bringing up the defendant, *Mary Bracklebank*, then an infant, till 21, the principal to be paid to her at 21, and if she died before 21, then to be paid to her representative; and bequeathed to the Rev. *Thomas Whitaker* 100 *l.* to *James Roberts* and *William Roberts* 100 *l.* each, to *Grace Ogle* 200 *l.* to *George, Ann, and Phæbe Ogle*, her children, 100 *l.* each, to *Joseph Scurr* 200 *l.* to *Benjamin Wright* 200 *l.* to Mrs. *Molyneaux* 400 *l.* to *Hannah Close* 150 *l.* to *William Hawkeswell* 100 *l.* to *Mary Ross* 200 *l.* to *Joseph Marshall* 200 *l.* all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator, thereby, gave all his messuages, cottages, lands, te-

tate, shall go to the person next of kin, and so far as they are constituted of real estate, to the heirs at law.

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nements and hereditaments, situate at the *Bank*, in the township of *Leeds*, with their appurtenances, and all his real estate, not therein before devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants *Smithson* and *Ibbetson*, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns for ever, in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c. for such price or prices as could be got for the same, and thereby to convert such real and personal estate, so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale, to pay all his debts, legacies, and funeral expences, and charges of proving his will; and after payment thereof, and retaining to themselves 50*l.* each, which he thereby gave them for their trouble, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after all such payments made, and putting out of the funds as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expences, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they, and the survivors of them, should, within six months after the same should be ascertained, pay the same unto his said legatees, *Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phæbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneaux, H. Close, William Hawkefwell, Mary Bracklebank, Mary Ross, and Joseph Marshall*, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of 250*l.* each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to *M. Thackeray* and *R. Gaunt*, during their respective lives, should upon the several deaths of them the said *M. Thackeray* and *R. Gaunt*, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and *Mrs. Molyneaux* died in the life-time of the testator.

The

The bill was filed by the next of kin of the testator, against the surviving legatees, and the heir at law; claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of 250*l.* as lapsed, and become part of the personal estate of the testator.

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The cause came on at the *Rolls*, 10 July 1778, when, his Honor (Sir *Thomas Sewell*) being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree, the plaintiffs appealed to Lord *Chancellor*; and the cause coming on to be heard before his Lordship,—

Mr. *Kenyon* attempted to support the decree;

But Lord *Chancellor*, being clear (without hearing much argument) that this was a tenancy in common in the residue, and that therefore the shares of the legatees who died in the testator's life-time, were undisposed of; said the only question was, whether such shares belonged wholly to the next of kin, or to the heir at law.

The *Attorney General*, Mr. *Madocks*, and Mr. *Selwyn* (for the plaintiffs, the next of kin) contended, that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of *Mallabar v. Mallabar*, *For.* 79, and *Durour v. Motteux*, 1 *Vez.* 320, must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard* (cited *ante* 501.) Mr. *Selwyn* mentioned the cases of *Flanagan v. Flanagan* (cited *ante*, p. 500.) *Fletcher v. Ashburner* (*ante*, p. 497.) and *Ogle v. Cook*, cited *ante*, 501.

Lord *Chancellor* thought the two former cases did not apply; but being, in general, of opinion with the counsel for the next of kin, asked the counsel for the heir at law, upon what grounds they could support his claim.

Mr. *Scott* for the heir at law, said they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates as the deceased residuary legatees would have been intitled

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to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed, of as is constituted by the produce of the testator's real estate. That the heir at law is intitled to every interest in land, not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir at law, to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take, he must make a disposition in favour of another: if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and a *fortiori* in a case where he has expressed no intention, to the *hæres natus*. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit, of the lapsed devises would, according to the case of *Digby and Legard*, and the principle of the case of *Emblyn and Freeman*, *Pre. Chan.* 541. and of many others, have accrued to the heir at law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir at law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made:—but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out, that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of *Durour v. Motteux*, and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal.—We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives.—But we insist that if he has not actually and eventually so decided, they upon the law casts the title to personal estate can no more claim in a court of equity, money arising from the sale of land, than the heir can claim property admitted to be of a personal nature.—As to the question of fact, whether he meant that in some event only, or that in all events the produce of his real estates should be considered as personalty, we admit that,

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that, in favour of his residuary legatees, he meant to convert the whole into personalty in case all his residuary legatees should, eventually, take the whole; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his legatees were to take; but, as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir at law and his personal representative, or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but to say he has made it all personal property, and that therefore the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention: though the testator therefore intended, that his legatees, if they had lived should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature in case that particular event of his should be disappointed. In the event, therefore, which has happened, it is so much undisposed of, arising from the sale of lands. Such money in this Court is land; and, as such, the heir claims it.— Suppose all the fifteen legatees had died in the life-time of the testator, would it not have been competent to the heir at law to have insisted, in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which, never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that because he had made the real

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real estate personal to give it to his residuary legatees, and to disappoint his heir, he meant also to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interests both of his next of kin, and his heir at law,—but it proves a purpose hostile to both: can that fact then be a ground, from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and adverse to the interest of the heir only. The reason of the intention ceasing the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property: but if, in the event, the law was to make the disposition of any part of the property,—he meant, for ought that appears to the contrary, (and something must appear to the contrary to defeat the claim of the heir,) that the law which made the disposition, should decide on the qualities of the property of which it was to dispose. If then, in case all the residuary legatees had died, the heir could have prevented a sale,—is it to be said, that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made to effectuate the testator's purposes, which are capable of taking effect that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblyn and Freeman, Pre. Chan.* 541. the heir was held intitled to 200 l. arising from the sale of real estate, which the testator had made liable to an appointment by note, concerning which he made no appointment; and there a sale was necessary. In the case of *Digby v. Legard*, where the heir was held intitled to the benefit of the devise lapsed by the death of one of five tenants in common of money, to be raised by sale of real estates in the life-time of the testator, the heir could not possibly prevent a sale: As to the cases of *Mallabar and Mallabar*, and *Durour v. Motteux*, they can be considered as authorities only by those who do not attend to the distinction submitted above: they are so far from deciding the case that they establish no principle which applies to it.—In *Mallabar and Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust

trust to sell: and that out of the moneys arising therefrom, the testator's debts should be paid, and after payment thereof, he devised, out of the remainder of the money 500 *l.* to his sister *Mary Bainbrige*, 500 *l.* to his sister's two children, that should be living at the time of his decease, equally to be divided between them, 500 *l.* to his nephew *Nicholas*, who was his heir at law, 500 *l.* to be divided amongst the children of his late brothers *James Mallabar*, living at his decease; then follows the clause which was held to blend the funds.—“*Item* after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister *Esther Mallabar* ;”—and appoint her executrix. The question was whether there was a resulting trust for the heir, as to the money arising from the sale of the real estate, after payment of the debts, and the several sums of 500 *l.* The Court held that the testator had made all his property personal, or rather it inferred from the purpose of the testator, as far as that could be collected from the will, that the testator meant by the residuary clause to describe not only money strictly personal estate, but the money claimed by the heir likewise, the Court inferred this from the circumstance of the heir's having a legacy of 500 *l.* out of that very money, and because, if a different construction was made, the sister his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office; for if the words, “the residue of the personal estate” did not include this money, the personal estate must have been first applied, to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble without the benefit intended her: but though the Court considered the surplus of the money as personalty, as between her, [whom it held to be a residuary legatee,] and the heir, to effectuate the testator's intention, does it follow, that if the testator had died intestate as to the surplus, as the testator here did as to a part of it, that the Court would have determined against the heir in favour of the next of kin in whose favour no such argument as to intention could have been urged? If the residuary legatee had died in the testator's life-time, the will must have had the same construction as if the residuary clause had not been inserted; for where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will: if it had not been inserted, the devise of the real estate would have

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been a devise to pay debts and legacies merely; in such case, then, it is clear that, as to the surplus, there would have been a resulting trust for the heir: The debts and the sums of 500 *l.* being paid, the testator's intention would have been satisfied, to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case, and the present case, except that in that case there is no residuary legatee, as to any part of the surplus; here there is none, as to some part of it; there, then, is a *general intestacy*, as to the surplus, here a *partial intestacy*: but the effect of a partial intestacy must be the same, as to the part, as the effect of a general intestacy is to the whole. The case of *Durour and Motteux* is also a case between residuary legatees, and the heir at law; there, the testator gave all his real estates to sell and dispose of the whole with his personal estate, blending them, for payment of his debts, legacies and funeral expenses and performance of his will; he gave several legacies, and among the rest, 1,200 *l.* or thereabouts, whereof part was to be laid out in the purchase of freehold lands for charitable uses, some of which were, confessedly, within the Mortmain act, and the rest determined to be so; the question was, whether the 1,200 *l.* should go to the heir at law, or to the residuary legatees, Lord *Hardwicke* said, that he was of opinion, that the money which should arise by the sale of the real estate was turned into personal, and so intended by the testator, it plainly appearing, that by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this,—a will is made, in which there are several legacies, and the residue of the personal estate is given away; one of the personal legacies is void by law; the Court cannot say, for that reason, that he intended to die intestate, for giving the residue over includes every thing, let it fall in by reason of the legacies being void, or lapsing in the life of the testator. — Now, here, the reasoning of the Court is grounded upon the testator's intention to give his residuary legatees every thing which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees could not otherwise take the 1,200 *l.* But if the residuary legatees had died in the life-time of the testator, and the next of kin had been called upon to sus-
tain

tain the question against the heir, the reasoning of the court would not apply: arguments from intention, in their favor, could not be resorted to, and the court might have said, and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not, in that case, have been said, that the testator meant, by the description of all his personal estate, to include the whole in the residue, and therefore the void legacy of 1,200*l.* among the rest; because the will, in that case, must be considered as if nothing concerning the residue had been inserted in it. Here, he meant to make one fund of the whole, to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention, in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour v. Motteux*, it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies, and funeral expences; it would have been then a disposition with a special intention; that intention being satisfied, there would have been a resulting trust as to the surplus. It is said, if this way of reasoning was good, it would have entitled the heir to the 1,200*l.* in the case of *Durour v. Motteux*, for it was the testator's intention there, that the same sum should be considered as money only, in case the charity took it; that the testator never adverted to the event which happened, viz. the residuary legatee's taking it, an event, which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer in that case, what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law. So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself, he would say, if my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place: but where the residuary legatee is removed, there is nothing like a declaration, by the testator, in favour of the next of kin, to entitle them to succeed the residuary legatees, as there is
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where there is a general residuary clause in a will in favour of the persons named in it to succeed the particular legatees; and to money arising by the sale of land, there can be no claim, in the next of his kin, but what arises from the declaration of the testator; for unless he directs, or expresses, that it shall be considered as personalty, the heir must take it. We admit the heir then to be excluded, whilst there are any persons who can take the produce of the real estate under the will, the declaration of the testator's intention: we deny that he is excluded by any who make their claim not under the will, but in defect of the will; or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse v. Barley and Banfon*, before Sir Jo. Jekyll, 3 Wms. 20. seems to establish those principles; for it shews, that where any part of the produce of the real estate is so given, as to prove that it was not the testator's intention, in case that part should lapse, that it should go to the residuary legatees, but that he has given them the residue, exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take in preference to the heir, what the residuary legatees cannot take for another reason, namely, removal by death? The case was, *William Banfon*, seised in fee of freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant *Barley* and his heirs, in trust to sell for the best price, and in the first place to pay off all his incumbrances and his debts. He also devised his personal estate to the same trustee, in trust to sell, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner therein after mentioned: To his eldest son 200 l. at his age of 21; all the rest and residue thereof among his four younger children at 21, and with benefit of survivorship; the eldest son died under 21: the question was, what was to become of the 200 l. The Master of the *Rolls* thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate, is to go to the *beneficiaries facti*. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed residuum:

dictum: But his Honor, after looking into precedents, declared for the heir, that it was the same as if so much land, as was of the value of 200 l. had not been to be sold, but suffered to descend. As to the case of *Flanagan v. Flanagan*, it is perfectly different from this: That was a question between the real and personal representative of a person intitled under the will of the testator. The land was sold under a decree of the court, in a cause in which the person, through whom both claimed, was party; and the decree had ordered the surplus, if there should be any, to be paid to *James Flanagan* the father, and *James Flanagan* the son, equally. The sale was made under the decree; and the question arising between the real and personal representative of *Flanagan* the father, the court determined the surplus should have the same nature, with respect to them, as the decree had given it with respect to *Flanagan* the father. In that case, too, the testator had, foreseeing that a sale could not be made, which would produce the exact sum, and no more, directed his trustees to convey the residue of the real estate, which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates, between the father and the son. *Scudamore v. Scudamore*, *Proc. Ch.* 513. is not to this point: it determines that the representatives of a person intitled under a will, shall take money, as money or as land, according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as intitled against the heir, in the event of a lapse of the whole, or a part of the residue, except the case of *Ogle v. Cook*, heard 19th February, 1748, which, so far as it relates to this subject, was thus: Mr. *Ogle* made his will in 1744, and gave his real estate to trustees to sell, and vest the money in stock, and pay the interest to his wife during her widowhood, and after her death, or marriage, the principal to his two daughters equally, except that the eldest was to have 1,000 l. more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance in trust to sell, for payment of his debts, which was held a revocation *pro tanto* only, and part was sold. One of the daughters died in Mr. *Ogle*'s life. The bill was brought by the widow, and the eldest daughter, against the son, the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter, as personal estate of Mr. *Ogle*, to

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be divided between them and the son. The son insisted, that her share was to be considered as real estate: the Court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. *Ogle's* personal estate. Here, it cannot be denied that the intention of the testator to convert this estate into money, for the sake of his daughters, was taken to be a sufficient ground for the Court's considering the moiety, which in the event was undisposed, as personal estate: But the case of *Digby v. Legard*, is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of the persons interested in the produce. The daughters, in the case of *Ogle v. Cook*, indeed had an interest in the personal, as well as real estate, which was not given in that of *Digby v. Legard*; but the funds are kept separate, and not blended in *Ogle v. Cook*. The determination in the latter case, we submit, is neither justified by principle nor by authority. The case of *Ogle v. Cook*, admits the deceased daughter's moiety, in both the real and personal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to a disposition, is to take effect, though the disposition does not take effect. Upon the whole, we contend, that, if the shares of the deceased legatees in the overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin, do not apply.

The *Chancellor* reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees, in the overplus, should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate, to the next of kin, and so much as was made up of the produce of the real estate, to the heir. He said, that he fully approved the determination in *Digby v. Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that, if all the legatees had died, the heir could, as he certainly

tainly might, he said, prevent a sale; and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir, and decreed as before†.

† See the case of *Robinson v. Taylor*. *post*. vol. 2. p. 589.

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CADLE against FOWLE.

Rolls, 26th
May, 1780.

THE plaintiffs filed their bill, stating a mortgage by the defendant's father, to the testator of the plaintiff *Cadle*, and another, and praying a sale. The defendant answered, admitting the mortgage; and then applied to the court, upon the act of 7 *Geo. II. c. 20.* for the usual decree upon a bill of foreclosure. The plaintiffs now applied to discharge that decree, and for liberty to amend their bill, by stating a bond, which they insisted they were entitled to tack to the mortgage.—The Master of the *Rolls* was of opinion, that the order already made, being a decree, though made upon motion, could not be discharged upon motion. The words of the act are, “the court shall make *such order, or decree, as the court might have made if the suit had been brought to a hearing, and all parties shall be bound by such order or decree, to all intents and purposes, as if such order, or decree, had been made at, or subsequent to the hearing of such suit.*”

A decree,
though made
on motion,
(under 7
Geo. 2. c. 20.)
cannot be
discharged
on motion.

WYNNE against COOKES.

THOMAS WELCHMAN WYNNE, and MARY his Wife,
Widow and Devisee of DAVID COOKES, deceased;
- - - - - Plaintiffs.

Trin. Term,
1780.
Baron *Eyre*,
for Lord
Chancellor.

THOMAS COOKES and GEORGE COOKES, Defendants.

SIR *Thomas Cookes*, seised in fee of a considerable freehold, and of a copyhold held of the manor of *Tarbig*, called *Cab-house*, by will dated 19 *February*, 1696, devised the estates and part of the copyhold in *Tarbig*, to his nephew *Thomas Winford* interest, is for the benefit not only of himself, but of all the persons in remainder.—Recovery by one not in possession, has no operation.

Enfranchise-
ment of a co-
pyhold estate,
by a person
having only
a particular
interest, is for the benefit not only of himself, but of all the persons in remainder.—Recovery by one not in possession, has no operation.

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for life, with remainder to his first and other sons in tail male; with remainder to *John Winford* for life, with remainder to his first and other sons in tail male; with remainder to *Henry Winford* for life, with remainder to his first and other sons in tail male; with remainder to *John Cookes*, and his heirs male for ever. Sir *Thomas Cookes* died in 1701, and upon his death *Thomas Winford*, afterwards Sir *Thomas Cookes Winford* entered, procured the *Tarbig* estate to be enfranchised, and a conveyance thereof to be made to him and his heirs. He died in 1743, without issue, and by his will gave the *Tarbig* estate to his wife dame *Elizabeth* in fee, considering himself as absolute owner of that estate; and she entered and continued in possession till 1752. *John* and *Henry Winford*, died without issue in the life-time of their brother Sir *Thomas Cookes Winford*, and *John Cookes*, the last remainder-man in the will of Sir *Thomas Cookes*, also died before Sir *Thomas Cookes Winford*, leaving two sons *John* and *Henry Cookes*. *John Cookes* upon the death of Sir *Thomas Cookes Winford*, entered upon all the estates devised by the will of Sir *Thomas Cookes*, except the *Tarbig* estate, and by indenture dated the 15th of April 1744, conveyed all the manors, &c. devised by the will of Sir *Thomas Cookes*, in general, to *Thomas Wyld* and his heirs, to make him tenant of the freehold for the purpose of suffering a recovery, and a recovery was suffered accordingly. At the time of the execution of the indenture of bargain and sale, and of suffering the recovery, dame *Elizabeth Cookes Winford* was in the actual possession of the enfranchised estate at *Tarbig*, and claimed the same as her own estate, and *John Cookes* was never in possession, nor ever made any entry, or did any act to avoid the estate of dame *Elizabeth*. By the custom of the manor of *Tarbig*, copyholds may be intailed, and intails may be barred by recovery suffered, or surrender made in the court of the manor according to custom. *John Cookes* died in ——— without issue, by his will, he devised all his estates to *William* and *John Russell*, in trust, to pay his debts, and subject thereto to his own first and other sons in tail male, with remainder to his daughters in tail general, with remainder to his nephew *Henry Cookes*, son of his brother *Henry* for life, with remainder to his first and other sons in tail male, with remainder to his nephew *David Cookes*, the second son of his brother *Henry* for life; with remainder to his first and other sons in tail male, with remainder to *Thomas Cookes*, the third son of *Henry*, and his first and other sons in like manner, with remainders over. *Henry* brother of *John* the last testator died in his life-time, leaving *Henry*, *David* and *Thomas*, his three

sons successive devisees for life, in the will of *John*. *Henry* the eldest, upon the death of *John*, entered upon all the estates of Sir *Thomas Cookes*, except the *Tarbig*, and in 1749, filed a bill against the widow of Sir *Thomas*, dame *Elizabeth Cookes Winford*, and *Hillier*, her then husband, stating the will of Sir *Thomas Cookes*, the enfranchisement of the estate, the several subsequent events, and claiming the *Tarbig* estate, by virtue of the limitations in the will of Sir *Thomas Cookes*. The cause was heard the 3d of *May*, 1749, when the Court declared that it appeared that Sir *Thomas Cookes Winford*, took the copyhold estate in question, and enjoyed the same under the will of Sir *Thomas Cookes*, and that the enfranchisement taken of the premises, was for the benefit not only of himself, but of all persons intitled thereto, in remainder under the will of Sir *Thomas Cookes*, and it was therefore decreed that, on payment, by the plaintiff, in six months of 750 *l.* the consideration for the enfranchisement, the premises should be conveyed to the use of the plaintiff, and the other uses in the will of Sir *Thomas Cookes*, then existing and capable of taking effect. Before any conveyance in pursuance of this decree, *Henry Cookes* died without issue, without having done any act affecting the *Tarbig* estate. His brother *David* therefore, upon his death, as heir male of the body of the first named *John Cookes*, claimed to be intitled to the estate as tenant in tail male, and, by indentures of lease and release dated the 8th and 9th of *June*, 1752, and made between dame *Elizabeth Cookes Winford* then a widow, by the name of *Elizabeth Hillier*, of the first part; *Henry Roberts* and *Joseph Kingdon*, of the second part; *David Cookes* of the third part; and *Thomas Banks*, of the fourth part; *Elizabeth Hillier* in consideration of 709 *l.* and in pursuance of the above mentioned decree, conveyed the *Tarbig* estate to *David Cookes* and his heirs, to the use of *David* and the heirs male of his body, and after reciting that a term of 1000 years created by Sir *Thomas Cookes*, (who had ineffectually attempted to enfranchise the estate,) was then vested in *Roberts* and *Kingdon*, they conveyed the estate, for the residue of that term to *Banks*, in trust for *David Cookes*, and further reciting that the above sum of 709 *l.* was paid by *Banks*, and that *David Cookes* had occasion for 591 *l.* more, *David Cookes* declared that the term should be a security for, and subject to redemption on payment of 1300 *l.* and interest to *Banks*. By indentures of lease and release, the 14th of *June*, 1752, *David Cookes* conveyed the estate to make a tenant to the *precipe* for suffering a recovery, and a recovery

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was suffered accordingly. In 1755, *David* made his will, and devised the estate to *Stephen Law*, in trust for the plaintiff *Mary* for life, and after her death, in trust for his daughters. *David* died in without issue, leaving *Thomas Cookes* his brother and heir, who paid off *Banks*, and took an assignment of the mortgage. The bill was brought by the plaintiff claiming under the will of *David Cookes*, praying liberty to redeem the mortgage, and an account of the rents, profits, and recovery of the estates, to the uses in the will of *David*.

Baron *Eyre* was of opinion, that by the "words heir male," the first named *John Cookes*, took an estate in tail male, under the will of Sir *Thomas Cookes*, that *John Cookes* his son, not having been in possession of the estate in question, when the recovery was suffered it had no operation on that estate, that *David* was therefore seised in tail male, that the recovery suffered by him barred the intail, and the estate was, therefore, well devised by his will, and decreed accordingly.

Trin. Term,
1780.Baron *Eyre*,
for Lord
Chancellor.

J. H. FRASER, Son of SIMON FRASER, and
MARY his Wife, - - - Plaintiff.

JAMES BAILLIE, and EVAN BAILLIE, the said
SIMON FRASER, and MARY his Wife, and their
Children, (except the Plaintiff,) - Defendants.

Where trustees are interposed, the court will not authorise a woman's parting with her life interest in a sum of money, upon examination in analogy to that upon a private examination.

SIMON Fraser the elder, intitled to two sums of money due to him on bond, assigned the same to *James* and *Evan Baillie*, in trust, to pay him the interest during his life, and upon his death, to pay the interest of part to his wife for her life, and after the death of the survivor, to pay and apply that part unto and amongst such child or children begotten or to be begotten of them the said *Simon Fraser* and *Mary* his wife, in such shares and proportions, and at such times, as she the said *Mary Fraser* should, notwithstanding her coverture, by any writing under her hand and seal, to be attested by two credible witnesses, direct or appoint; and, for want of such direction or appointment, then in trust, to pay and apply the trust-money and the interest thereof, to all and every the child or children of them the said *Simon Fraser* and *Mary* his wife then living, to be paid intirely to one such child in case there should be no more than one, and to be equally

equally divided among them share and share alike, in case there should be more such children than one, but in case there should be no such child or children living, then in trust for the executors, administrators, and assigns of the said *Simon Frazer*. *Mary Frazer*, made an immediate appointment of 500*l.* part of this money in favor of the plaintiff, one of the sons of her and her husband, and, by the same deed, she and her husband meant to part with the interest of 500*l.* during their lives. The bill was brought to compel the trustees to pay the 500*l.* to plaintiff, and, for that purpose, prayed that *Mrs. Frazer* might be examined by the Court, as to her consent to part with her interest for life in the 500*l.* in the nature of a fine at common law of real property, and that a commission might issue to take her examination. An objection was raised to the validity of the appointment, as a partial execution of the power, not an entire disposition of the whole trust fund. It was particularly observed that the trust deed did not enable *Mrs. Frazer*, from time to time to appoint, which are the words commonly used, and that it declared no trust of any part which should remain unappointed in case any appointment should be made.

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FRASER
against
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Baron *Eyre*, objected that it did not occur to him that, in any case where trustees had been interposed, the Court had authorized the departure with the property of the wife, by examining her in the nature of a fine at law.

AWSE against MELHUISE.

Baron *Eyre*,
for Lord
Chancellor.Trin. Term,
1780.

Testator
gives to his
heir at law
for life, re-
mainder to
R. C. for life,
and to his
first and o-
ther sons, re-
mainder to
R. S. and *W. M.*
for their
joint lives,
and to the
survivor of
them, the
survivor is
only to take
an estate for
life.

ROBERT *Awse*, the plaintiff's husband, by his will, gave to the plaintiff 50*l.* a year, and the use of his house at *Horwood*, with the household goods, plate, &c. for and during her life, over and above her jointure, in case he should die without issue male; and he gave to his sister *Mary Melhuish*, 200*l.* and several other legacies, and all his estates and effects, manors, messuages, lands, tenements and hereditaments, which he should have in possession or reversion, whether freehold or leasehold, he gave, devised, and bequeathed to *Richard Stevens*, his father-in-law, *William Melhuish* his brother-in-law, and *Richard Clarke*, his cousin, in trust, in the first place for payment of the plaintiff's jointure, and the legacies given by his will; and as to all his manors,

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AWSE
against
MELHUISE.

manors, messuages, lands, tenements, and hereditaments therein before devised to his said trustees, subject to his legacies, and the plaintiff's jointure, he willed, directed, and devised the same to be in trust for his sister *Mary Melbuisb* for her life, and after her decease, in trust to his cousin *Richard Clarke* for his life, and after his decease in trust for his first and other sons in tail male, *Richard Clarke*, or his son so inheriting taking the name of *Awse*, instead of *Clarke*; and as to the rest and remainder of his goods, chattels, and hereditaments not therein devised, he directed the same should be laid out in lands, and settled to the uses above directed, with respect to his freehold estates; and that till lands could be found, the interest should be paid to the persons enjoying his freehold estates; and in case the said *Richard Clarke* should die without issue, he gave devised and bequeathed all his estates and effects, manors, messuages, lands, tenements, and hereditaments whatsoever, in possession or reversion to the said *Richard Stevens*, and *William Melbuisb*, during their joint lives and to the survivor of them; he appointed *Richard Stevens*, *William Melbuisb*, and *Richard Clarke*, executors of his will, and gave to each of them for their trouble 100*l.* *Robert Awse*, died in 1764, without having had any issue, leaving the plaintiff his widow, and *Mary Melbuisb*, his sister and heir at law. *William Melbuisb* died, leaving *Richard Stevens* surviving; *Richard Clarke* also died, without having had any issue. Afterwards *Richard Stevens* died, leaving the plaintiff his heir at law, and having made his will, and devised his real and personal estate to the plaintiff and made her sole executrix. The plaintiff brought her bill against *Mary Melbuisb* the sister and heir at law of the testator, and against the heir at law of *William Melbuisb*, and the widow and personal representative of *Richard Clarke*, claiming as heir at law and residuary devisee and legatee, and executrix of her father *Richard Stevens*, to be intitled to the freehold estates of the testator, after the death of *Mary Melbuisb*, and the personal estate to be laid out in the purchase of land; upon the same event, and therefore praying that the will might be established, and the trusts performed, and, particularly, praying an account of the personal estate, and of estates purchased therewith by Mr. and Mrs. *Melbuisb*.

On behalf of the plaintiff, it was contended by Mr. *Mansfield*, Mr. *Waller*, and Mr. *Scott*, that by the devise of the will to *Stevens*, and *Melbuisb*, and the survivor, the whole interest in the free-

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hold and leasehold estates, and in the estates to be purchased with the rest of the personal estate, passed to *Stevens* as surviving *Melhuish*, subject to the previous estates created by the will; that the words used were sufficient to carry the fee in the freehold, as well as the absolute interest in the leasehold to the survivor, and that the lands to be purchased with the personal estate, were to be settled to the same uses throughout, as were to be limited of the freehold estate, that the testator meant by the will, to dispose of all his property: He gave a life estate in the whole to his heir at law, and where he meant to give estates for life only to others, did so by express words; that the devise to the survivor of *Stevens* and *Melhuish*, being unaccompanied by words of limitation, it was evident the testator meant to give them the whole interest, that the words in which he had given the estates to *Stevens* and *Melhuish*, were the same as those in which he had devised the estates to the trustees, to whom he clearly meant to give the absolute interest, to answer the purposes of the trust; that the words used in the devise in question, were sufficient to convey all the interest the testator had in the property, as well as the property itself: For this purpose was cited a case of *Jackson v. Hogan*, in the House of Lords in 1776, (7 Bro. Plt. Ca. 417.) where a devise of the residue of the testator's effects both real and personal, was held to carry the absolute property. It was further contended that, if a small transposition of the words was made, they would be clearly sufficient to carry the fee-simple, that if the devise had been to *Stevens* and *Melhuish* for their lives, and then had followed the words, I give, devise, and bequeath all my estates and effects, manors, &c. whether in possession or reversion to the survivor, there could have been no doubt that the absolute interest in the entire property would have passed to the survivor; that the devise as it stood was in fact the same. A second point was made on the part of the plaintiff, that if the estate in trust in the personal estate, to be laid out in lands, did not pass to the survivor of *Stevens* and *Melhuish*, then it was undisposed of, and a moiety belonged to the plaintiff as widow of the testator.

On behalf of the defendant Mrs. *Melhuish*, it was contended by Mr. *Madocks* and Mr. *Kenyon*, that as there were no words added to the devise to the survivor of *Stevens* and *Melhuish*, the survivor took, in the freehold estates, an estate for life only, and that therefore was undisposed of and descended to Mrs. *Melhuish* as heir at law; that the heir at law was not to be disinherited, but

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by express words, such as leave no doubt of the intention of the testator: That the words used in the devise in question, were mere words of description, and that as the estates were given first to the devisees for their joint lives, it was absolutely necessary to add the devise to the survivor to give him an estate for life.

On the part of Mrs. Clarke, it was submitted to the Court, whether she might not have an interest in the leasehold estates, as personal representative of her husband: Yet it might be contended the words, "and if the said Richard Clarke shall die without issue," which preceded the devise to Stevens and Melhuish, gave him, by implication, an estate in tail general in the freehold estate, and consequently the absolute interest in the leasehold estate.

In answer to this claim, it was insisted, that by the words, "without issue," must be intended without such issue as before mentioned, namely, issue male, and then no estate could arise to Mr. Clarke by implication. In support of this were mentioned, *Blackborn and Edgley*, 1 P. Wms. 600. *Bamfield and Popham*, 1 P. Wms. 54. and *Jones v. Morgan*, *Fearne's Cont. Remrs.* 334.

Baron Eyre,—Two questions have been made in this cause. It has been insisted, on behalf of the plaintiff, that she is intitled to the reversion in fee of the freehold estate, and to the absolute interest in the leasehold, they being devised to the survivor of Stevens and Melhuish, without any words of limitation; and that she is intitled, in like manner, to the fee of the estates to be purchased with the personal estate, and therefore she prays an account of the personal estate: the devise is to Stevens and Melhuish, and to the survivor, there is no doubt of the general rule of law, as to the effect of such limitation, but the intent of the testator may controul or enlarge the strict legal construction of words. The question will not be affected by the consideration, that the heir at law will be excluded if the plaintiff prevails. It is clear the testator intended to exclude the heir at law to a certain extent, and where a testator has manifested an intention of devising an estate to a certain length, there is an end of the claim of the heir at law, except upon the construction of the devise. The strict rules of construction must prevail, the legal effect of words must take place, unless there is a manifest intention to the contrary. By the clear legal construction of the words in question, if the devise was a mere gift of lands, the devisee

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3. Term Rep. B. 1.
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devisee would take only for life. The question is, whether, upon this will, there is an apparent intent to enlarge the estate, and make it an estate in fee. It has been contended, for the plaintiff, that there is such an intent declared; that an estate for life in the whole is given to the heirs, and, from thence, it is contended that the testator intended to exclude the heir from further benefit. It is a great deal too much to conclude, from the devise to the heir for life, that so much was intended. The principal objects of the testator's bounty, appear to have been his cousin *Richard Clarke* and his issue; there is a limitation in tail to the issue, and they are directed to take the name of *Awse*, there is no such limitation or direction to the children of the heir at law, or to the survivor of *Stevens* and *Melhuish*. *Clarke* and his issue were the persons whom the testator considered as perpetuating his name and family; if they failed he had no particular object of his bounty. But why should the devise to the heir exclude the strict legal construction of the words used in the devise to the survivor of *Stevens* and *Melhuish*? The heir at law takes not by designation of the testator, but because the property is undisposed of; the law did not necessarily carry it to Mrs. *Melhuish*; if she had died before the testator, it would have gone to others. It has been attempted to make use of the general words in the devise, to the trustees without any limitation of estates, and from thence to argue that a fee must also have been intended to pass by the second devise in the same words: But in the second devise with those general words, there is an express limitation to *Stevens* and *Melhuish* for their joint lives; which goes a great way to shew that the intent was to give a life estate only, to the survivor; besides the Court does not raise a fee to the trustees, by the naked words of the devise, but, the testator having given estates upon trusts, for the performance of which a fee is necessary, the Court must necessarily hold the devise to the trustees to be a fee; in the subsequent devise, the court must look for other words to enlarge the devise. An argument has been drawn from the generality of the words used, "all his estate and effects, &c." and it has been insisted that the words are so general, so descriptive not only of the lands themselves but of the interest in them, that they must mean the whole interest in the lands, as well as the lands themselves. It is impossible to build so much on these words, because a life estate is expressly limited upon these words; it is clear that the testator meant there no more than a description of the subject of the devise, not of the interest devised. Upon what prin-

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principle then can I determine that the survivor took a different interest from the joint-tenant? I see no reason why the testator should mean or wish to give more than a life estate to the survivor: this is, indeed, mere conjecture; but I am desired, upon conjecture, to enlarge the legal construction of words, I will not narrow it. There is no manifest intent of the testators to enlarge the words beyond their strict legal meaning, or to confine them. The law must therefore determine the question. By the strict legal construction of the words, the survivor takes a life-estate only in the freehold. I must, therefore, determine that the plaintiff is entitled to the leasehold, subject to the life-interest of Mrs. *Melhuish*; but that she is not entitled to the freehold, and, consequently, is not intitled to the lands to be purchased with the personal estate; I must therefore dismiss the bill as to that.

DAVIES *against* TOPP.

SARAH DAVIES, and another, in behalf of themselves and other Creditors of JOHN TOPP, deceased, and MARTHA LLOYD, in Behalf of herself and other Legatees of JOHN TOPP, - Plaintiffs.

RICHARD TOPP, (late LLOYD) Executor of the Will of JOHN TOPP, and Devisee for Life of his real Estates, SARAH LLOYD and JANE PRICE, Sisters and Co-Heirs of JOHN TOPP and ROBERT PEMBERTON, a Mortgagee, - Defendants.

July, 1780.

Testator devised certain estates subject to a general charge for payment of debts: he afterwards purchased another estate which descended: this shall exonerate the devised estate if the personal be insufficient to pay the debts.

JOHN TOPP, seised in fee of considerable real estates, subject to a mortgage to *Pemberton*, made his will 3d of May, 1777, and, thereby, as to his worldly estate, either real or personal, after payment of his debts and funeral expences, gave and disposed thereof in manner following: He gave to his sister *Sarah Lloyd*, an annuity for her life, to be paid to her by the person or persons, who, for the time being, should be seised of his real estates under his will, and he also gave several pecuniary legacies, and he charged and made chargeable all his real and personal estate (except part of his personalty given as heir-looms)

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with the payment of his debts and legacies aforesaid, and subject thereto, he devised all his manors of *Whitton* and *Vennington*, and all his real estates in the counties of *Salop* and *Montgomery*, (which were all the real estates he had at the time of making his will) to his nephew *Richard Lloyd* for life, on his obtaining the king's licence to bear the arms and assume the surname of *Topp*; remainder to trustees to preserve contingent remainders: remainder to the first and other sons of *Richard Lloyd* in tail-male: remainders over in strict settlement: And he gave several articles of personal estate, to be enjoyed as heir-looms by the devisees of his real estate: and as to all the rest of his personal estate, subject to the payment of his debts, legacies, and funeral expences, he gave the same to his said nephew *Richard Lloyd*, and appointed him executor of his will.

After making the will the testator purchased a freehold estate at *Vennington*.

In *April*, 1778, he died without issue, leaving *Sarah Lloyd* and *Jane Price*, his sisters and heirs at law, upon whom the estate at *Vennington*, (purchased after the making of the will) descends.

The bill was brought for an account, and application of the personal estate, not specifically bequeathed, in payment of debts and legacies, in a course of administration; and in case the personal estate should not be sufficient, then to establish the will, and to have the deficiency raised by sale or mortgage of a competent part of the real estate.

The cause was heard at the Rolls on the 15th and 25th *February* 1780, when the will was established, and the proper accounts directed, and the personal estate, not specifically bequeathed, was ordered to be applied in payment of the debts, legacies, and funeral expences, in a course of administration; but, in case such personal estate should not be sufficient for the payment of testator's debts, his Honor declared that the deficiency, as to what should be remaining due to defendant *Robert Pemberton* the mortgagee and the other specialty creditors, ought to be raised by sale or mortgage of the real estate descended to the heirs at law: and ordered and decreed that such deficiency should be raised by sale or mortgage of the said estate, or a sufficient part thereof,

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and the money to arise by such sale or mortgage was to be applied in making good such deficiency; and in case the personal estate and money to arise by the sale of the real estate descended, should not be sufficient for the purpose aforesaid, it was declared that the rents and profits of the said estate were to be applied to make good such deficiency, and an account and application of such rents and profits was directed: And in case the defendant *Pemberton*, the mortgagee, or any of the specialty creditors should have exhausted any part of the personal estate, the simple contract creditors in the first place, and the legatees in the next place, were to stand in the place of such specialty creditors, and receive a satisfaction *pro tanto*, out of the real estate descended. But in case the fund aforesaid should not be sufficient for payment of the debts and legacies, under and according to the direction aforesaid, it was declared, that the deficiency ought to be made good out of the real estates devised by the will, charged with the payment of the testator's debts and legacies, and proper directions were given for that purpose.

The costs were apportioned between the personal estate and the real estates, and the costs out of the real estates were to be raised in the order and manner before directed, with respect to the deficiency of the debts.

The heirs at law appealed to the Lord *Chancellor* against so much of the decree as applied the real estate descended, in the first place, to make good the deficiency of the personal estate, to pay the mortgagee and specialty creditors, and the consequent direction, and the direction as to the costs.

The appeal was heard before Lord *Thurlow*, in *July*, 1780.

The case relied upon by the devisee of the real estates which passed by the will, and which had been relied upon by the Master of the Rolls, was *Galton v. Hancock*, 2 *Atk.* 424. 427. 430.

On the other side the principal case cited was *Corbet v. Davies*, or *Corbet v. Kynaston*, 5th *December*, 1743, or *Powis v. Corbet*, 3 *Atk.* 556.

Lord *Chancellor*,—It is impossible to distinguish this case from *Galton v. Hancock*. The first fund for the payment of debts is the personal

personal estate; the second fund may be estates devised for payment of debts; and the third fund estates descended: but estates particularly devised are never applied till all the other funds are exhausted. Where a person, seised of three or four estates, devises one estate for the particular purpose of paying his debts, that estate is applied: I therefore do not apprehend that the general rule, cited as sustaining *Galton v. Hancock*, "that estates descended must, always, be applied to exonerate estates devised," is law. Where an estate is particularly devised for payment of debts, yet the personal estate, as the primary fund, unless exempted by the testator, shall be first applied. But I do not recollect any case where debts have been directed to be paid out of real assets descended, in preference to estates so devised. The contrary has been decided, as in *Corbet v. Kynaston*, where two estates were in the possession of the testator, and one was devised, charged with a term for the payment of debts. I heard the defendants, the devisees, principally to obtain a distinction between *Corbet v. Kynaston*, and *Galton v. Hancock*. What is the effect of the full principle of this decree, and of *Galton v. Hancock*? Simply this: Where a testator gives the whole of his estate, at the time of the devise, subject to a general charge (not to a particular charge, for that would make a difference) he means to give the devisee all that can be saved of his affairs, after payment of his debts. If he afterwards becomes possessed of an estate by devise or purchase, thus much is clear, by charging his estate with payment of his debts, it could not be in his contemplation to charge an estate which he actually gave, in favour of an estate which he had not. In that case, the estate descended could not be stated as the object of his intention to exempt; whereas if a testator has two estates, and charges one, the inference is, that he means to exempt the other. I do not wonder that *Galton v. Hancock* should be, at first, looked upon as matter of great difficulty. The principle of *Galton v. Hancock*, as stated, is, that the testator did not mean to charge his estate with a view to future property. Yet he might so mean. It is unfit, however, where cases are precisely similar, that different judgments should be given: therefore, whatever might have been the reasoning upon *Galton v. Hancock*, when decided, it is exceedingly fit to collect the principle upon which it was decided, to govern other cases. The principle which seems to distinguish the case is this: When a general charge is made, applicable to the whole estate of the testator at the time, no intention appears that the

estate

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estate is so charged with a view to exonerate future property; but where a testator charges part of his estate, leaving other part to descend, his inclination to burthen a part, in exoneration of the rest, is manifest*.

* *Vide Donne v. Lewis*, vol. 2. p. 257.

20th July
1780.JONES *against* the Earl of SUFFOLK.

Testator devises the residue to his children, but if any of his daughters shall marry, without the consent of her mother or guardians, her share to go to those unmarried. This is a condition subsequent, and a daughter who married without consent is entitled.

*But under
the devise
in this case,
for the devise
never seem very
strong.*

GEORGE JONES, of Woolwich, in Kent, by his will, having given his household goods, &c. to his wife, gave and bequeathed all his other estates to his said wife *Mary Jones*, for and during so long of her life as she should continue his widow, in trust to pay his debts, and educate his children till each should be married, and after the decease or marriage of his said wife, then he directed all his real, leasehold, and personal estate should go to, be paid, and applied to the equal use of all and every such his child or children as should be then living; and in case his wife should marry again, she should, from that time, have no further to do with any his child or children, or any of his effects, &c. but the child or children should be under the care of guardians, to be chosen and appointed as soon as possible upon that occasion, and trustees should be appointed for his effects for the benefit of his children, till they attain the age of 21; and in case any of his children should die before they should attain the age of 21, then his or her share should go and equally be divided among the surviving ones; and in case any of his daughters should marry without the consent of her mother, and in default of her mother, her guardians first had and obtained, then her share to be equally divided among the unmarried ones; and in case they should all die before their respective ages of 21, then his estates, &c. to be subject to the will of his wife, provided she be unmarried at the time of his decease; and appointed his wife, and *William Stevens* (her father) joint executors of his will, and guardians of his children.

Ret.

Mary, one of the daughters, married without consent; and the question was, whether she had forfeited her interest under the will.

Lord Chancellor,—This is a case of difficulty.—It is a condition subsequent to defeat an interest vested, and therefore to be construed with all strictness.—The words are, “*without consent of guardians* ;” in the plural number. The will has appointed two guardians ; it has given a special authority to be exercised only by the wife, while both are alive ; and in default of the wife only, the authority is to be exercised by *guardians*. The case cited of *Peyton v. Bury*, 2 *Wms.* 626. goes a great way.—The *name* of guardian, as the *name* of executor, survives, but *the authority in question* is collateral to the *office of guardian*.—That case, while it stands, is of weight ; but I should have much hesitation to decide upon it. Suppose a power was given to guardians to let an estate for 21 years, a special authority, and one should die, I am apprehensive the court would not, with alacrity, determine that the surviving guardian had not a power to let. When it is said that conditions to defeat an estate are odious, I feel it ; but it is a disagreeable argument to guide a decision. What one person may think odious, another may judge of differently : the decision must depend on the feelings of the judge ; I should therefore be sorry to go upon the odiousness of the condition.—The position of the will is nonsense. The clause appointing guardians is subsequent to the whole of the provisions in question ; the provisions are subsequent to a clause directing the appointment of guardians, upon default of the wife. If one daughter had died before the marriage of the other, the clause could have no effect : if the unmarried daughter should now marry more imprudently, the claim could have no effect. This could not have been the intention of the testator. Arguments from supposition of what a testator would have done, if he had been aware of all circumstances, are not very good grounds for giving a construction ; but they may be fairly used to assist a dubious *floating construction*. Upon the whole, the intention of the testator, throughout his will, is very imperfectly and inadequately expressed. It is clear we have not his *whole* intention. I am very doubtful whether the word *guardians* must not refer to other persons than the *guardians* appointed by the will. It seems absurd to suppose that he meant to trust, upon the death of his wife, unmarried, the person whom he did not mean to trust, in case of her marriage. In conscience I believe, that the circumstance was not in his contemplation at the time he wrote the will.

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against
SUFFOLK.



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JONES
a. ainst
SUFFOLK.

His Lordship at first directed an account to be taken, without any declaration of the rights of the parties, saying he would further consider the point; but, after some hesitation, declared his opinion that *Mary* was entitled, notwithstanding her marriage; and decreed accordingly.

Rolls,
8th March,
1781.

Devise to all
the children
of *A.* at the
age of 21:
a child born
after the
death of
testatrix shall
take.

see *W. v. W.*
Cha. Cas. 353.
434. & 391.

CONGREVE *against* CONGREVE.

THE case arose on the will of *Ann Nicholls*, who gave her real estate to trustees, upon trust to permit her nephew *T. Congreve*, to receive the rents for his life, and after his death to sell the estate and divide the money amongst all and every the child and children of *T. Congreve*, at the age of 21; she also gave her personal estate to the same trustees, in trust, to divide the same amongst all the children of her said nephew at 21, she directed her nephew to maintain the children out of the rents and profits, and gave the trustees power to apply any part of the interest of the personal estate, for the maintenance of the children. She also made a codicil to her will.

The question was, whether the plaintiff, a child born after the death of the testatrix, was entitled to a share of her estate: all the other persons were born before the making the will.

The Master of the *Rolls* stated this case, and delivered his judgment to the following effect.

I shall just take notice of a case before Lord *Hardwicke*, where the general rules are laid down, that is *Ellison v. Airey*, 1 *Vez.* 111. (which he went through)—In *Hales v. Hales*, before Lord *King*, (cited in the argument of *Ellison v. Airey*,) the will goes to children living at the death, because it speaks from that time, therefore from *Ellison* and *Airey*, the rule is to confine the gift to persons living at the death, unless the will speaks otherwise.

I will mention a case of *Bartlett v. Hollister*, * before Sir *Thomas Clarke*, the 25th of May 1757, the words were much the same

* *Bartlett v. Hollister*, or *Bartlett v. Lynch*, *Rolls* 26 May 1757, *William Adams*, by will dated 25 April 1742, gave to *Luke Hollister*, and the defendants *Lynch* and Others,

same as in the present case. One child was born after the testator's death; and the question was, whether that child should take; and Sir Thomas Clarke, thought he should. This is the case of a trust; there is nothing to confine it to children born in the testator's life time, and the interest is a future one.—*Bartlett v. Hollister*, is directly in point. It was insisted, by the counsel, that the property consisting of real and personal estate, the personal estate should be taken first, though last in the will: But the Court said not. In *Goodwin v. Goodwin*, 3 Atk. 370. there was no decision. † In that case, *Wild's* case 6 Co. 16. b. was mentioned which was a devise to A. for life, and after his decease, to his children; and it was held all his children should take, "for the intent appears that all shall not take immediately, but after the death of A."—In *Stanley v. Baker*, Moore 220. *Hitchcock* possessed of a lease for years devised it to his two sons, and for default of issue of his sons, that the term should remain to his daughters. The testator died and afterwards the son died. There were two daughters born at the death of the testator, and one afterwards born. It was adjudged, all should take, because he had used the general words *his daughters*. Here is no direction what is to become of the interest of the personal estate, but there is a direction to apply any part for maintenance. This is a strong addition to *Bartlett v. Hollister*, the personal estate is immediately the property of the children, though not immediately given to them; if it were, a power to apply the interest would be un-

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against
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Others, a freehold estate, upon trust for his daughter *Hannah* for life, remainder to the heirs of her body; and for default of such issue, then upon trust, to sell and equally divide and pay the money to and amongst all the children of his sisters, the defendant *Elizabeth*, wife of *William Bartlett*, and the defendant *Mary May* then the wife and afterwards the widow of *John May*, when they should attain their respective ages of 21 years. The testator died April 1743 O. S. leaving *Hannah* his daughter and only child and heir at law, who entered and died in 1746, unmarried, and without issue; *Elizabeth* the wife of *William Bartlett*, had at the testator's death, six children plaintiffs in the cause; and *Mary May*, had at the testator's death, seven children also plaintiffs, *Mary May* had after the death of the testator, a child, *Mary* a defendant. The bill charged that *Mary May*, was not *in esse* or *ventre sa mere* at the death of the testator. She submitted by her answer, that she was entitled to a share with the plaintiffs, as born in the life-time of *Hannah Adams*, the daughter of the testator, and before the trust for sale took place. His Honor declared, that such of the 14 children of the testator's two sisters as had attained 21, were each entitled to one 14th part of the money, as there were 14 children of the testator's two sisters, at the death of *Hannah* the testator's daughter without issue; and he directed their shares to be paid accordingly, and the residue to be paid into the Bank, and such of the 14 children as were under 21, were to be at liberty to apply when 21, for their separate shares.

† Note *Sed Vid.* 1 Vezey 227. Lord Hardwicke determined that the after born daughter took.

necessary.

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necessary. The children are to have the interest with the principal; except what is applied under the power.

Isaac v. Isaac, before Lord Camden, the 6th of December 1768, was a bequest *per verba de presenti*, *George Stevenson*, having a niece, and being informed she had children, gave the residue to her children, to be paid into a bank or stock, and the interest to defray the expence of their learning, the principal to be paid to the children at 20; if no child, the interest to be paid to her or her husband for seven years, and then to be divided between the husband and wife. His Lordship was of opinion, that the testator's meaning was, if there was no child at his death, and she had none for 7 years, then the money should be divided. In that way there might be children to take. The fact was there were children. As to *Roberts * v. Higman*, I think it was right. There were no particular circumstances in the case. In the present case, I think the plaintiff entitled to a share with the other children.

* *Roberts v. Higman*, 12 July 1779.—Testator devised all his goods and chattels to *John Cole* and *John Higman*, to be sold to pay his debts, and the overplus (if any) to be employed for the best use of their children begotten, by the testator's daughters *Margery Cole* and *Elizabeth Higman*, equally to be divided between them.

The daughters had children born before the will made, others after and before testator's death, and others after his death; and the question was which should take, the Chancellor held, that the division was to take place at the testator's death, and, therefore, that all the children born in the life-time of the testator took, but not those born after his death.

ELTON against SHEPHARD.

Rolls, 18th
June, 1781.

A gift to
trustees to
pay the pro-
duce to A.
without li-
miting the
duration of
the interest,
an absolute
gift of the
principal.

MARY TRUBSHAW gave, by will, to trustees, 2,000 l. in trust to pay the produce to her daughter *Mary Elton*, wife of *Abrabam Elton*, esq. mother of the plaintiff, for her own sole and separate use, independent of her husband, and not subject to his debts or controul, her receipt alone to be a sufficient discharge for the same; and did authorise, empower, and appoint, her said daughter, to give and dispose of the said 2,000 l. as she should by any will or writing under her hand, direct, and appoint: And the testatrix gave the residue of her personal estate to the same trustees, in trust to pay the produce to *Mary Elton*, during her life, her receipt alone to be a sufficient discharge; and after her death in trust, to pay the interest to the testatrix's grand-daughter

grand-daughter the plaintiff for life, and in case her said grand-daughter should die leaving any child or children at her death, she authorised and impowered her said grand-daughter, to give, bequeath, and dispose of such residue, to such child, or children, in such manner as she should think fit; but, if her grand-daughter should die without leaving any child or children at her death, she gave the said residue to the children of her brother, *William Shephard* one of the trustees.

1781.

ELTON
against
SHEPARD.

The 2,000*l* was set apart, and *Mary* the daughter died without having made any appointment. It was claimed by *Mary* the grand-daughter, as part of the personal estate of her mother, either as an absolute gift to her, or as undisposed of in the event which had happened, and therefore resulting for the benefit of the mother, as next of kin of the testatrix.

His Honor was of opinion that the first words in trust, *to pay the produce to Mary Elton for her separate use*, being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment, were merely an anxious expression of the intention of the testatrix, that she should have an uncontrollable power of disposing of the fund.

LISLE against LISLE.

Lincoln's
Inn-Hall,
3d July,
1781.

BY settlement, made previous to the marriage of *Charles Lisle* and *Ann* his wife, certain stocks and securities were agreed to be transferred, and were afterwards actually transferred to trustees, in trust, after the death of *Charles Lisle* and his wife, for all their children, in such manner as they, or the survivor should, by writing, appoint. *Charles Lisle* died, having made no appointment; after his death, *Mrs. Lisle* made her will, and thereby appointed the trust, stocks, and securities, among her children. Afterwards, upon the marriage of *Susannah* one of her daughters, she by deed-poll appointed part of the trust stock to that daughter, in full of her share of the trust-funds, unless either of her sisters should die under age and unmarried, appearing, by this expression, to refer to the appointment

Appointment (under a power) by will is revocable by a subsequent appointment by deed, though no power of revocation is reserved by the will.

See Prec. in Ch. 474.

1781.

LISLE
against
LISLE.

she had made by her will, though she took no notice of that appointment, and the appointment by the deed-poll, gave a greater share to *Susannah* than she would have taken under the will. It was contended that the present appointment, being by writing, merely, without any mention of a power of revocation, and no power of revocation being contained in the will, it was irrevocable, and the subsequent appointment, consequently void. On the other side it was insisted, and the *Chancellor* was of opinion that the first appointment being by will, was made by an instrument in its nature revocable, and that the subsequent appointment, was therefore good, and he decreed accordingly.

Rolls, 3d Ju-
ly, 1781.

The Court
will not com-
pel a trustee
to preserve
contingent
remainders to
join in a re-
covery, un-
less to con-
tinue the
estate or under
very par-
ticular cir-
cumstances.

*See Lord Hard-
wicke's argu-
ment from
his own pa-
pers in Cotton
& Garth. 206. 11.
1. Dick. 190. 179.
& 200. 180. 179.
Mer. 9. Ver. Jun.
240.*

BARNARD against LARGE.

J.C. Ambl. 77A.

THE plaintiffs in this cause, were *Thomas Collier Barnard* and his eldest son; the defendants were *Large*, a trustee in the will of *Thomas Barnard* and *J. Wall*, remainder-man in fee, under that will; the bill stated that *Francis Barnard*, by his will, devised freehold, and copyhold estates to the plaintiff, *Thomas Collier Barnard*, for 99 years, if he should so long live, with remainder to the defendant *Large* and his heirs, during the life of *Thomas Collier Barnard*, in trust to preserve contingent remainders, with remainder to the first and other sons of *Thomas Collier Barnard* in tail-male; with remainder to *J. Wall* in fee; that *Thomas Collier Barnard* had issue only one son, the co-plaintiff, who was tenant in tail under the will, and had attained 21, that the plaintiffs were desirous of suffering a recovery, and limiting the estate so as to preserve the contingent remainders to the second and other sons of *Thomas Collier Barnard*, but the defendant *Large* having refused to concur in making a tenant to the *præcipe*, a recovery, could not be suffered; and the bill therefore prayed that the trustee the defendant *Large* might be decreed to join in making a tenant to the *præcipe* for the purpose of suffering a recovery; the plaintiffs submitting to declare the uses of the recovery to the second and other sons of *Thomas Collier Barnard*, by way of contingent remainders, as limited by the will, and to a limitation of an estate to trustees for the purpose of supporting and preserving those contingent remainders.

His

1781.

BARNARD
against
LARGE.

His Honor, having taken time to consider the case, now delivered his opinion; he observed that the objects of the will were the first taker, *Thomas Collier Barnard*, his first and other sons, and their issue male, and the remainder-man in fee, and that the case should rely upon the will. He then proceeded to the following effect: By the order of law, a recovery cannot be suffered by the tenant for 99 years, and the tenant in tail, without the concurrence of the trustee; the trustee refuses to concur, and the bill is brought to compel him.—The sole question, therefore is, whether this is a case in which the Court ought to compel the trustee to concur; for this purpose it is necessary to consider the nature of the trust: All the persons claiming under the will, take as volunteers, and are all objects of the ^{testator's} trustees' bounty, the last remainder-man, as well as the first taker. Trustees to preserve contingent remainders, are here appointed for two purposes: first, to preserve the estate against the father's power to destroy it; and secondly, to prevent the injury of any improper influence of the father over the son, to induce him to join in destroying the entail created, in cases where he ought not to join; there is, therefore, necessarily a discretion in the trustees, a discretion which if they use improperly, the Court will punish them; and if they refuse to exercise their discretionary power upon a reasonable occasion, the Court will compel them to do it. In so doing, the Court takes upon itself the exercise of that discretion, which ought to be exercised by the trustees; but the Court has a discretion in what cases it will do this. There is a discretion between punishing trustees, for joining in the destruction of contingent remainders, and compelling them to join; the Court proceeds according to the nature of the discretion given to the trustees, treating it as an honorary trust; it will be proper therefore to see by what rules the discretion of the trustee is directed, in what cases he has been considered as warranted in joining, and in what not. The rules seem sufficiently established, the trustee, though properly appointed only to preserve contingent limitations, is in effect a trustee, for all vested as well as contingent remainders, and has been so considered; but with respect to vested remainders, if they have been to remote relations upon settlements where the persons to whom they were limited were not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail, desiring a reasonable benefit consistent with the intentions of the creators of the limitations, their pretensions have not been much considered: Here all take as volunteers,

1781.

BARNARD
against
LARGE.

lunteers, and all are equally to be considered. The first case which has occurred, is in 1693, 2 *Vern.* 303. This seems to have been a case of necessity, the estate was originally an equity of redemption merely, the mortgage could only be paid off by sale, it was therefore necessary to sell, or all would be lost. The next case is *Pye v. Gorges*, *Prec. in Chan.* 384. 1 *Wms.* 128, 2 *Salk.* 680. in which the joining of trustees to destroy contingent remainders was considered as a breach of trust. The next is the case of *Tipping v. Pigot*, 1 *Eq. C. Abr.* 385. in which the Court refused to relieve against the act of trustees, in favour of a person who was not within the consideration of the settlements. In the case of *Else v. Osborne*, 2 *Vern.* 754. 1 *W.* 387. *Michaelmas* 1717, the Court approved the conduct of trustees, joining with the first son tenant in tail, to destroy contingent remainders. And in the case of *Frevin v. Charlton*, *Eq. Ca. Ab.* 386, the trustees were directed to join, but this was in contemplation of a marriage, and to remedy a blunder in the settlement, by which the term for securing daughters portions was limited, subsequent to the estates tail to the sons. The next case was *Winnington v. Foley*, 1 *W.* 536, in which the Court for the purpose of a new settlement, and in contemplation of a marriage, decreed the trustees to join; but in *Townsend v. Lawton*, before Lord King, in 1726. 2 *W.* 379. *Sel. Ca. in Ch.* 71. (3 *Wms.* 279.) The Court refused to interfere. The last case which has been mentioned, is *Woodhouse v. Hoskins*, 3 *Atkyns* 22. in this case, Lord Hardwicke refused to compel the trustee to join; not thinking it a case in which the trustee ought to be compelled, and he remarked that the case of *Winnington v. Foley*, was to make a marriage settlement, and so to continue, in effect, the uses of the old settlement, and after the uses of the new settlement were served, the estate was limited to the old uses. From this view of the cases determined, the reason of them seems to be, that when the eldest son tenant in tail is of age, and about to marry, and thus continue instead of destroying the purposes of the settlement; and in some cases, where there has been particular distress, under particular circumstances which ought to have induced the trustees to act, there the Court has interfered; but where no such circumstances have occurred, the Court has refused to interfere. In the present case, I am called upon to disturb the testator's disposition: and for what reason? merely to disturb it. No other object is offered, why then disturb the testator's will? let the law take place, dismiss the bill with costs.

DEVISME

1782.

DEVISME *against* MELLO.4th July,
1782.

Between WILLIAM DEVISME and JAMES DEVISME,
Esqrs. and FLIZABETH DEVISME, an Infant, by her
next Friend, - - - Plaintiffs.

ARNOLD MELLO, surviving Executor of STEPHEN DE-
VISME deceased, JACOB BLAQUIERE, ANDREW DE-
VISME and ELIZABETH DEVISME, Executrix of WIL-
LIAM DEVISME deceased, and Administratrix of SO-
PHIA DEVISME deceased, - Defendants.

S. D. gave
5000 l. to
purchase
stock, the in-
terest to M.
for life; then
to W. for
life; at his
decease to
testator's
god-son S.
and at his
death, to be
divided a-
mong his bro-
thers equally:
S. was dead
at the time
of the will
made, a son
of W.

born after
testator's
death, who
would have
been a bro-
ther of S. had
he lived, shall
take a share
in the 5000 l.
The testator
also, by a
codicil, gave
4000 l. to L.
for life, and,
in case he had
no children
to revert to
W's children;
a daughter of
W. who was
alive at the
time of the
codicil being
made, but died
before W. had
a vested in-
terest, which
was held
transmissible
to her repre-
sentative.

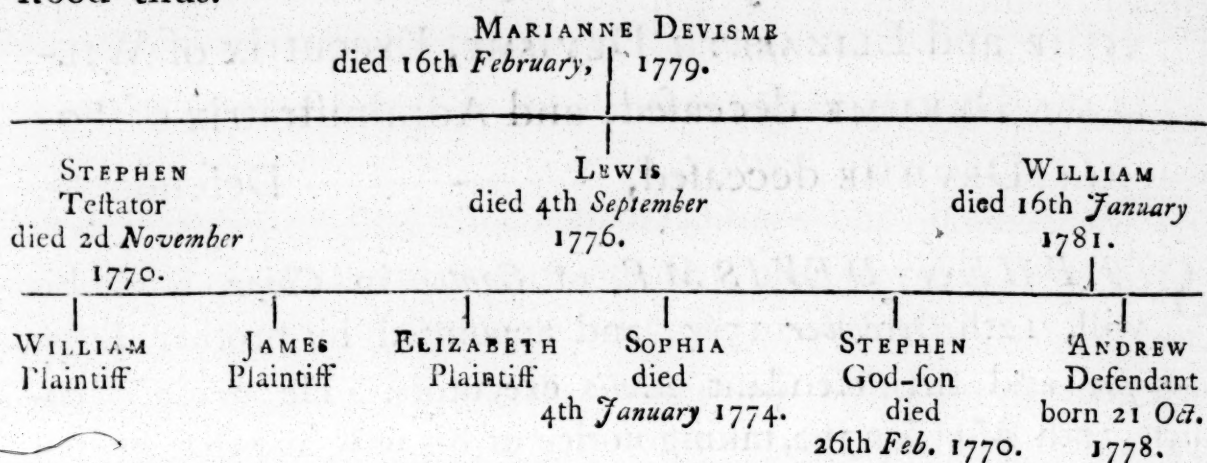
STEPHEN DEVISME, of *Canton in China*, made his
will, 12th December 1763, and appointed his brother *Lewis*
Devisme and the defendant *Mello* executors. He made a co-
dicil, 20th March 1770, taking notice of his will, and that he had
thereby disposed of most part of his effects, and that he had since
increased his fortune, and by the codicil he gave as follows *viz.*
“ I give and bequeath a further sum of 5,000 l. sterling, to pur-
chase stock, and the interest to be paid to my mother *Marianne*
Devisme; at her death the interest to be paid to my brother *Wil-*
liam Devisme; and at his demise to my god-son *Stephen*; at his de-
cease, if before he is of age, to be divided among his brothers equally:”
And another bequest is contained in the codicil as follows, “ To
my brother *Lewis Devisme* 4,000 l. to buy stock, to enjoy the in-
come during life, and in case he does not marry and leave chil-
dren, to revert to my brother *William's* children in equal parts:”
And he gave the residue of his whole estate, real, and personal,
to his brother *William Devisme*, and appointed him sole residuary
legatee of his codicil.—*Stephen Devisme* the testator died, 2 No-
vember 1770.—*Lewis Devisme* renounced probate of the will and
codicil, *William Devisme* and *Arnold Mello* proved.—*Stephen De-*
visme, the god-son of the testator, died an infant of 4 years of age,
26th February 1770, in the life-time of his father *William Devisme*,
and of the testator, and before the date of the codicil, having
at the time of his death two brothers, the plaintiffs *William* and
James, who were his only brothers at the time the testator made
his codicil, and at the time of the testator's death.—The plain-

See 3. Bro.
Ch. Cas.
353. n.
434. n.
391. n.
7. Ves. Jun.
124.

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against
MELLO.

tiffs *William*, and *James*, and *Elizabeth*, and *Sophia Devisme*, who died 4th *January* 1774, were the only children of *William Devisme* testator's brother, living at the time the testator made his codicil, and at his decease; *Lewis Devisme* brother of the testator, died 4th *September* 1776, unmarried and without issue; at his death, *William* had no children except the plaintiffs.—*Marianne* the mother died 16th *February* 1779.—*William Devisme*, the father of the plaintiffs, died 16th *February* 1781, leaving the plaintiffs and the defendant *Andrew Devisme* who was born 21st *October* 1778, after the death of testator *Stephen Devisme*, and after the death of *Lewis Devisme*; the family pedigree therefore, stood thus.



The family had set apart the two sums of 5,000 *l.* and 4,000 *l.* and applied them in the purchase of stock, and the produce of the first being 5,500 *l.* 3 *per cent.* annuities, stood in the names of *Mello* and *Blaquiere*, and the second being 4,400 *l.* 3 *per cent.* annuities, in the name of *Mello* only.

The bill prayed, that the rights and interest of plaintiffs, in the 5,500 *l.* and 4,400 *l.* annuities, purchased with the 5,000 *l.* and 4,000 *l.* might be ascertained, that the shares of the plaintiffs *William* and *James*, who had attained 21, might be transferred and paid to them, and the share of the plaintiff *Elizabeth* secured for her benefit.

At the hearing of the cause, it was contended, for the plaintiffs, that they alone were entitled to the whole of both funds; that *Andrew Devisme* being born after the death of *Stephen* the god-son, and of the testator, could not take any part of the 5,000 *l.* by the description of a brother of *Stephen*; and that being born after the death of *Lewis Devisme*, as well as after the death of the testator, he could take nothing in the 4,000 *l.* That *Sophia*, having died in the life-time of *Lewis*, could take nothing in the 4,000 *l.* and as *Stephen* the god-son died in the life-time of the testator,

testator, no interest in that sum passed to him; nor was the share which he would have been entitled to, if living, to be considered as lapsed, and falling into the general residue.

1782.

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On behalf of the defendant *Andrew Devisme*, it was contended that he was entitled to a share of the 5,000*l.* having been born before the fund was distributable. It was insisted, that, in this case, the disposition of the 5,000*l.* in case of the death of *Stephen* the god-son, though in words to the *brothers of Stephen*, yet was to be considered as a disposition in favour of *sons of William Devisme*, the brother of the testator; and that, in that character, the testator meant a bounty to the plaintiffs *William* and *James*; and that, therefore, though *Andrew* was never, strictly speaking, a *brother of Stephen*, he might nevertheless take under that designation. That the word *brothers*, as well as the words *children* and *sons*, was general, and would extend to *all* brothers, unless it appeared the intent of the testator was to use it in a limited sense. That it had been the aim of courts of justice to limit such general words, for the sake of convenience; but their guide, in all cases, had been the intention of the testator, where that intention was consistent with the rules of law. Where a gift *was immediately* to take effect, *in all its consequences*, at the death of the testator, there the persons who answered such general description at the time of the testator's decease, were alone to take, because *that must* be the intention of the testator; but where a gift was not immediate, there it was not so evident that the testator meant to controul the extended meaning of general words; and they might have their operation at a time subsequent to his death. If, therefore, the thing given was subject to circumstances which prevented an immediate distribution, as a prior interest, a power of appointment, or a contingency, general words used in the gift might have their full latitude till the gift actually took effect by division of the money, provided the intention of the testator did not appear to the contrary; and they might operate to delay the division, if the intention of the testator to continue this extended meaning to a more distant period, was declared, and that intention was consistent with the rules of law. In support of the first, that the word *brothers of Stephen* were to be construed as describing *sons of William*, it was urged that the words were used merely as words of relation to *Stephen*, whose name was the antecedent; but that it was obvious, from the terms of the bequest, that the object of the testator's bounty in the whole bequest

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quest were *William*, to whom the property was given for life, and his sons, that there was a clear intention to prefer *Stephen*, as the godson of the testator, to the other sons of *William*; but, in case *Stephen* could not take, there was no intention of further preference of any son of *William*: That, from the state of *William's* family, the testator must have had in contemplation the probability of the birth of other sons; and that consequently *Stephen* might have other brothers besides those in being, and that it could not have been his intention that the death of *Stephen*, sooner or later, if he could not take the benefit, should have any operation on the extent of the provision intended for other sons of *William*. To shew the ground for the rest of the argument, several cases were cited.

In support of the assertion that general words, in a bequest, were to be construed as used in their most extended sense, unless the intention of the testator appeared to the contrary, or the rules of law and the necessity of preventing a suspension of rights obliged the court to decide against the testator's intention, the cases of *Bartlet v. Lynch*, at the *Rolls*, 26 May, 1757, (stated *ante*, p. 530 note), and *Congreve v. Congreve*, (*ante* p. 530) *Roberts v. Higman*, (*ante* p. 531. n.) *Baldwin v. Karver*, (since reported by Mr. *Cowper*,) after-born children were let in to take, were cited from manuscript notes. From the printed books several cases were also mentioned, to shew that general words might have their full operation delayed until the time when the fund was to be distributed. Thus in *Harding v. Glyn* 1 *Atk.* 469. where the testator gave his personal estate to his wife, desiring her, at her death, to dispose of the same among his nearest relations, and she made no appointment; it was determined that the property vested in such relations of the testator as were his next of kin at the death of his wife, when the distribution was to take place. So in *Lord Teynham v. Webb*. 2 *Vezey*, 198. the character of younger son was necessary to continue till the time of payment. Upon the same principle the case of the Duke of *Marlborough v. Lord Godolphin*, 2 *Vezey*, 61. was determined, where Lord *Sunderland* gave 30,000 *l.* to his wife for her life, and after her death to be distributed among such of his children, and in such proportions as she should, by deed or will, appoint. She, by will, appointed, and two of the appointees died in her life-time. It was determined that appointment to them could not take effect. In the case of *Coleman v. Seymour*, 1 *Vezey*, 209. it was determined that

that a younger child, become an elder after the death of the testator, should take, upon a gift to younger children; but, there, the gift was immediate; and Lord *Hardwicke* observed, that the construction might have been different if the money had been given to the mother for her life. And in *Horsley v. Chalonier*, 2 *Vezey*, 83. the gift being immediately to be paid to the children at 21, the Master of the *Rolls* held a child born after the death of the testator, should not take; but in *Graves v. Boyle*, 1 *Atk.* 509. where a life interest in the property was first given, it was determined that children born after the death of the testator, during the continuance of the life interest, should take under general words. In *Maddison v. Andrew*, 1 *Vezey*, 57. where the testator gave 300 *l.* to the children of his sister *Sarah*, to be equally divided, share and share alike, at their ages of 21, or marriage, and failing the share of any, to the survivor; and failing her, shares of all to another sister, *Grace*; *Sarah*, having only one child at the time of the will, and the testator having given it to *children*, with benefit of survivorship, and given it over to another family, upon an event which he must have intended to be the failure of all the children of *Sarah*, Lord *Hardwicke* thought this bequest, though *immediate*, must be construed to be for the benefit of all the children *Sarah* might have.

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DEVISE
again't
MELLO.

On behalf of the defendant *Elizabeth Devisme*, as administratrix of her daughter *Sophia*, it was contended, that *Sophia* took a transmissible interest in the 4,000 *l.* under the words "to revert to my brother *William's* children in equal parts." *Sophia* being living at the death of the testator, died before *Lewis Devisme*, the tenant for life; for though the bequest was subject to a contingency, that contingency did not affect the capacity of *Sophia* to take at the death of the testator, if the contingency had then happened, and therefore according to *King v. Wilbers*, *Cases temp. Talb.* 117. and several other cases, her interest, though contingent, was transmissible to her representative.

Lord *Chancellor* was of opinion, that he was obliged to say the words in the bequest of 5,000 *l.* to brothers of *Stephen*, were not confined to those who were his brothers at the time of making the codicil: that the testator must have had in contemplation other sons coming into being; that the intention of the testator appeared to be to make an aggregate description of a part of the family of *William*, by the name of brothers of *Stephen*, as if he

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against
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had used the words male children of *William*, that he made use of the word *brothers* merely by relation to the antecedent, the name of *Stephen* used in the former part of the bequest, and that he could not otherwise have described the sons of *William* but by a circumlocution; he therefore declared that *Andrew*, being born before the time of distribution of the fund, was entitled to a share of the 5,000 *l.* He was also of opinion, that the representative of *Sophia* was entitled to a share of the 4,000 *l.**

* Note, v. *post.* *Gilmore v. Severn*,—and *Viner v. Francis*, vol. 2. p. 658.

In the case of *Singleton v. Singleton, Gilbert and others*, 24th February 1784. *Elizabeth Palmer*, by will 11th June 1757, gave her real estates to trustees for 500 years, upon trust, for raising 200 *l.* for better securing her debts and other purposes; with remainder to trustees for 1000 years, in trust to repay the 200 *l.* and raise annuities, and subject to the terms, she gave the estate to *all and every the child and children* of her brother *Thomas Gilbert*, and the heirs of the body and bodies of such child or children, as tenants in common, if more than one, in equal proportions; and in case of failure of issue of the bodies of such child or children, whose issue should so fail, to *every the remaining child or children*, of the said *Thomas Gilbert*, and to the heirs of the body and bodies of all and every such child and children if more than one, to take as tenants in common; and *if there should be a failure of issue of all such children*, or if there should be but one such child, then to such remaining or only child; in default of such issue, to her brother the said *Thomas Gilbert* for life, with remainders over: And she directed the remainder of her personal estate to be placed at interest, and subject to annuities, and she gave, it to all and every the child and children of her brother *Thomas Gilbert* who should live to attain 21, such children, if more than one, to take equally, if only one, then such only child, and if there should be no such children, or none who should attain 21, then she desired her personal estate and the residue of the rents and profits of her real estate to be distributed amongst her next of kin. *Thomas Gilbert* had two children, *Richard* and *Elizabeth*, born before the death of the testatrix; and three children *Susannah*, *Thomas*, and *Edward*, born after the death.—The bill was brought by the plaintiff, the daughter of *Susannah* who died before 21, claiming the benefit of her mother's supposed share of the real estate of the testatrix, as claiming the share as heir of the body of her mother.

Lord Chancellor was of opinion, that there was no point of time in this case to which the words, *all and every the child and children* of *Thomas Gilbert* could be confined, except the death of the testatrix, and therefore determined that the plaintiff's mother *Susannah*, who was born after the death of the testatrix, could have no share.

Ayton v. Ayton, Rolls, 14 February 1787, *George Lee*, by will dated 10th October 1762, bequeathed to his wife *Mary Lee*, the residue of his real and personal estate *for life*; and after her death he gave the same to the children of Mr. *John Ayton* and his wife *Jane*, to be equally divided amongst them the said *Jane Ayton's* children, and not any children of any other marriage, by either party.—The testator died 15th December 1762, without issue.—*Mary Lee*, his widow died, 11th April 1763.—At the death of the testator and his widow, *John Ayton*, *Susannah Ayton*, and *Mary Ayton*, (since dead) were the only children of *John* and *Jane Ayton* then born; but they had afterwards three other children, *Hannah*, *Jane*, and *Elizabeth*, all born after the death of *Mary Lee* the wife.

His Honor, (Sir *Lloyd Kenyon*,) declared that the interest in the residue of the testator's personal estate vested absolutely in the three children of *John* and *Jane Ayton*, who came into esse during the life of *Mary Lee*, and that those born after were not entitled to a share.

The

1782.

The Hon. HENRY NEVILLE, JOHN ROBINSON, and
 HENRY SHELLEY, Esqrs. - Plaintiffs.
 JOHN WILKINSON, - - Defendant.

20th Nov.
1782.

THE plaintiffs filed their bill and the following case appeared on the defendant's answer.

Injunction granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiffs, (on a treaty of marriage with his daughter,) that there was no such demand existing.

In June 1777, the plaintiff *Neville*, who was the son and heir apparent of Lord *Abergavenny*, became acquainted with the defendant, who was an attorney, and they had several transactions together, the principal object of which was the raising money to supply Mr. *Neville's* necessities.

In June 1781, Mr. *Neville* having paid his addresses to marry the daughter of the plaintiff *Robinson*, the defendant was requested by Mr. *Neville*, to make up a state of his affairs to lay before Mr. *Robinson*, which the defendant did to the amount of 26,000*l.* including demands of the defendant on Mr. *Neville*, to a considerable amount; and meetings were had to settle this state of debts between *Neville* and the defendant, and *Butcher* another person employed by *Neville*, and who had a considerable demand on *Neville*; and, in the course of their conversations, it appeared that the demands of *Butcher* were stated below their real amount, and that there were debts not included in the amount; but *Neville* represented to the defendant and *Butcher*, that he had assured *Robinson*, that his debts, in the whole, did not exceed 18,000*l.* and that he was very sure, if *Robinson* knew that his debts were so enormous, he would hesitate consenting to the marriage; although he was sure, after the marriage had taken place, that he would pay the full amount of *Neville's* debts, that he had obtained the consent of the lady and her friends, and of his friends; that he should be unhappy and ruined unless the marriage took effect, and that he saw no other mode of effecting it, but by persuading the defendant to forego making a claim of his whole debt, due to him from the plaintiff *Neville*, and by persuading *Butcher* to forego claiming a part of his demand. The defendant was prevailed upon by the intreaties of *Neville*, to conceal his debt from Mr. *Robinson*, and to omit the same in the amount of the debts of *Neville*, to be made out and delivered to Mr. *Robinson*; having received from *Neville* assurances that the debt due to the defendant should be paid or considerably reduced

1782.

NEVILLE
against
WILKINSON.

duced out of the income which his father Lord *Abergavenny*, and Mr. *Robinson* had agreed to allow him; and that *Robinson* had agreed to give *Neville* 50,000*l.* with his daughter, and to make his annual income 5,000*l.* a year. An account was delivered, by the defendant, to *Neville*, of money received and paid by the defendant, in some annuity transactions which was examined by Mr. *Atkinson*, as a friend of Mr. *Robinson*, but not finally settled; and particularly the defendant told *Atkinson*, that he had a considerable demand on *Neville*, for business done in his profession, and for money expended in his business; he was then asked by *Atkinson*, if he had any other demands on *Neville*, and said he had not, in pursuance of his promise to *Neville* to conceal his demand from *Robinson*.

On the 4th of *October* 1781, Mr. *Neville* was married to Miss *Robinson*, and the fact was, (though the answer denied any knowledge of it,) that, by indenture 29 *September*, 1781, previous to the marriage it was declared that a sum of 18,000*l.* paid into the hands of a banker, in the name of the plaintiffs *Robinson* and *Shelley*, and mentioned in the settlement on the marriage of Mr. *Neville*, and Miss *Robinson*, should be applied to redeem the annuities, and pay the debts granted and contracted by Mr. *Neville* previous to his marriage, and that, if there should be a surplus, it should be paid to trustees in the settlement. After the marriage the 18,000*l.* was applied in discharging demands on Mr. *Neville*, together with a further sum advanced by Mr. *Atkinson* for that purpose, and the defendant was employed to pay several of those demands consisting of tradesmen's bills, he also paid to a person who lived with Mr. *Neville*, before his marriage 417*l.* which was re-paid by Mr. *Atkinson*, and the defendant on this occasion refusing to give a receipt in full of all demands, was asked by *Atkinson*, if he had any other demands, and he said he had not.

After these transactions the defendant claimed of *Neville*, a debt to the amount of 4,758*l.* 16*s.* 6*d.* exclusive of interest, and also exclusive of his demand for his fees and disbursements in business, and it appeared that he had a bond from *Neville*, for 1,000*l.* in part security for his demands; part of this demand was for money advanced subsequent to the marriage. The bill prayed a general account offering to pay what, if any thing, should appear justly due, that the bond might be delivered up, and an injunction,

injunction; and it appeared to found a claim to this relief, on suggestions that the demand of the defendant was not in its origin just, rather than upon the ground of fraud, in the concealment, by the defendant, of his demand on the plaintiff *Neville*.

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Upon the answer, a motion was made by Mr. *Attorney General*, (*Kenyon*), for an injunction, and he founded his motion on the ground of fraud, he principally relied on a case of *Turton* and *Benson*, 1 *P. Wms.* 496. and *Redman v. Redman*, 1 *Vern.* 348.

Mr. *Scott*, on the other side, contended that this case differing from any former case, he considered, and it was admitted, that the defendant's demands in the way of business and for money advanced since the marriage, were indisputable; and that the only doubt was, as to the debt due to the defendant before the marriage, which it was alledged had been fraudulently concealed from Mr. *Robinson*, to induce him to consent to the marriage. With respect to this demand, he endeavoured to distinguish the case of the defendant from any case apparently similar which had been before the Court; insisting, that these cases had either been where the consideration of the original contract was bad, as marriage-brokers bonds; or they had been where a parent had bargained for his child, upon an article in which he had been deceived; but, in this case, the original contract was good, as the fairness of the defendant's demand was not disputed, and it did not appear that Mr. *Robinson* had been deceived in an article, upon which he had bargained in behalf of his daughter, as it did not appear that Mr. *Robinson* had made the amount of the debts of *Neville* a positive condition in the treaty for the marriage.

In order to found the injury, it ought to appear from the answer.

1st. That in point of fact, Mr. *Robinson* did make it a term agreement that Mr. *Neville's* debts amounted only to 18,000*l.*

2d. That the defendant knew that he so did.

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3d. That

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3d. That knowing this, the defendant had conveyed to *Robinson* a misrepresentation, under the influence of which *Robinson* had actually agreed.

Lord *Chancellor* had at first considerable doubts; but after looking into the cases with considerable attention, he delivered his opinion to the following effect:

He observed, that Mr. *Scott* had attempted to distinguish this case from any of the former cases apparently similar, upon this ground, that in all those cases the parent had stated an article in which he had been deceived, and had bargained upon that article; here the defendant confessed a confederacy to cheat *Robinson*, that *Neville* had told him, that he had represented his debts to *Robinson* as not exceeding 18,000*l.* and that he was sure that, if *Robinson* knew the amount of his debts, he would hesitate consenting to the marriage; but *non constat* that *Robinson* had ever insisted that 18,000*l.* should be the extent of the debts of *Neville*. His lordship said, he could not make the distinction; he would not lay it down as a rule that fraud, in cases of this nature, must be upon an article expressly contracted for. If any man, upon a treaty for any contract, will make a false representation*, by means of which he puts the person bargaining under a mistake upon the terms of bargain, it is a fraud; it misleads the parties contracting, on the subject of the contract. It has been said here is no evidence of actual fraud on *Robinson*, but only an admission of a combination to defraud him. A court of justice would make itself ridiculous, if it permitted such a distinction: misrepresentation of circumstances is admitted, and there is positively a deception. His Lordship then adverted to the case of *Gale v. Lindo*, 1 *Vern.* 475, and observed, that there upon a treaty for a marriage, the woman not having so great a portion as the man insisted upon, prevailed upon her brother to let her have 160*l.* to make up her portion, and gave him a bond for repayment of it: The marriage was had; and the husband, who knew nothing of the bond, died without issue: The wife survived, and after her death, and the death of the brother, the defendant, his executor, put the bond in suit against the plaintiff, her executor: the bond was there set aside in her favour; a bond given by herself, and sued against herself, that is against her representative. A quere is put by the

* See *Pearson v. Morgan*, *post.* vol. 2, p. 388.

reporter,

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reporter, if the condition of the bond had been, that in case the woman survived her husband, that she should pay it, whether she could have been relieved: His Lordship thought this would have made no difference: The principle, he observed, on which all those cases had been decided, was, that faith in such contracts was so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall, not only not gain, but even lose by it: He then observed upon the cases in which it had been determined, that upon a criminal act, a person who was *particeps criminis*, could not be relieved in a court of justice; and particularly the case of *Tomkins v. Barnett*, 1 Salk. 22, and *Skinner* 411, which was an action of *indebitatus assumpsit*, by a person who had paid money on an usurious contract, against the person who had received it. This, he observed, remains in the books, and is cited; but has been departed from in point of principle and application: and to shew this, he mentioned the case of *Astley v. Reynolds, Strange*, 915, which was an action against a pawnbroker for taking more than legal interest, and *Moses v. Macferlan*, before Lord Mansfield, 2 Burrow, 1005, and *Wilkinson v. Kitchen*, Lord Raymond, 89, which was an action of *indebitatus assumpsit* for 70 l. given by the plaintiff, who was committed on two indictments for clipping, &c. to the defendant, a Newgate solicitor, to procure his discharge, and for the defendant's pains: Not being prosecuted, he brought his action for the whole 70 l. and, upon the trial, the question was whether money given to a man to be expended in an ill use, might be recovered by the giver, who was *particeps criminis*; and it appearing that the money had been disposed of in bribes, a verdict was given for the plaintiff: and Sir B. Shower cited a case where a bribe was given to a custom-house officer, for exempting goods from payment of custom, which being discovered, and the goods seized, the party recovered his money in *indebitatus assumpsit*. This, however, appears to be against the assertion of Lord Hale, at the close of the case of *Tomkins v. Barnett, Skinner*, 412. His Lordship's founding himself on the case, he had mentioned, declared his opinion, that, in all cases where money was paid for an unlawful purpose, the party, though *particeps criminis*, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state

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state in which they were before. And he considered the rule as now clear; and mentioned a case of *Bromley v. Smith*, before Lord Mansfield, 1760, where a bribe was given to a creditor of a bankrupt, to induce him to sign a certificate: he also mentioned, upon the point before him, a case of *Montfere*, in 1762, from Mr. Filmer's notes, in the hands of Mr. Attorney General (*Kenyon*) where, in order to procure a marriage, a brother of the intended husband represented, that he was indebted to the intended husband, on a partnership account, and gave a note for 1,730 *l.* to be shewn to the parents of the wife, to induce them to enter into the contract; and the brother gave a bond of indemnity: no part of the money was settled on the marriage, and the note was their inducement to the marriage: There were afterwards many disputes between the brothers, and at length they referred their dispute to arbitration: The arbitrators thought that the note was given upon no consideration, and disallowed it in their account: The court reversed the award, on that single ground, because where one brother had given to the other the note for 1,730 *l.* to enable him to make a contract of marriage, he could not revoke it; it amounted to a contract to perform what he had done. His Lordship was, upon these grounds, clear that Mr. Neville himself was entitled to relief: he had doubted before, on what had been said by Lord Macclesfield, that the father of a child, in such a case, had an interest to see that the property of the husband was such as it had been represented to be, but he now thought clearly with him. He was of opinion that

* The following cases were also cited, *Key v. Bradshaw*, 2 Vern. 102. *Lambe v. Hannan*, 2 Vern. 499. *Hall v. Potter*, Shower's Part. Cases, 76. *Law v. Law*, 3 P. Wms. 391. *Blanchet v. Foster*, 2 Vez. 264. *Webber v. Farmer*, 2 Brown's Plt. Cases, 88. *Morrison v. Arbuthnot*, H. L. 1728, which was as follows: On a treaty of marriage between Lord Arbuthnot, then a minor, and the daughter of Morrison, it was agreed that Morrison should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord Arbuthnot and his friends in consideration of that fortune. The night before the execution of the articles, Morrison prevailed on Lord Arbuthnot privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that Morrison had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord Arbuthnot bound himself to release Morrison from 10,000 marks, part of the 50,000. When Lord Arbuthnot came of age, he brought his action to have this obligation reduced, on two grounds, 1. That it was granted by him whilst a minor, without the consent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree, Morrison appealed to the House of Lords, where the decree was affirmed, with 80 *l.* costs.

an injunction should be awarded to restrain the defendant from proceeding to recover any debt due before the marriage of Mr. *Neville* (except his bill for business, which the parties agreed to settle); and he declared his opinion that the defendant could not ever recover that debt against Mr. *Neville*.

1782.

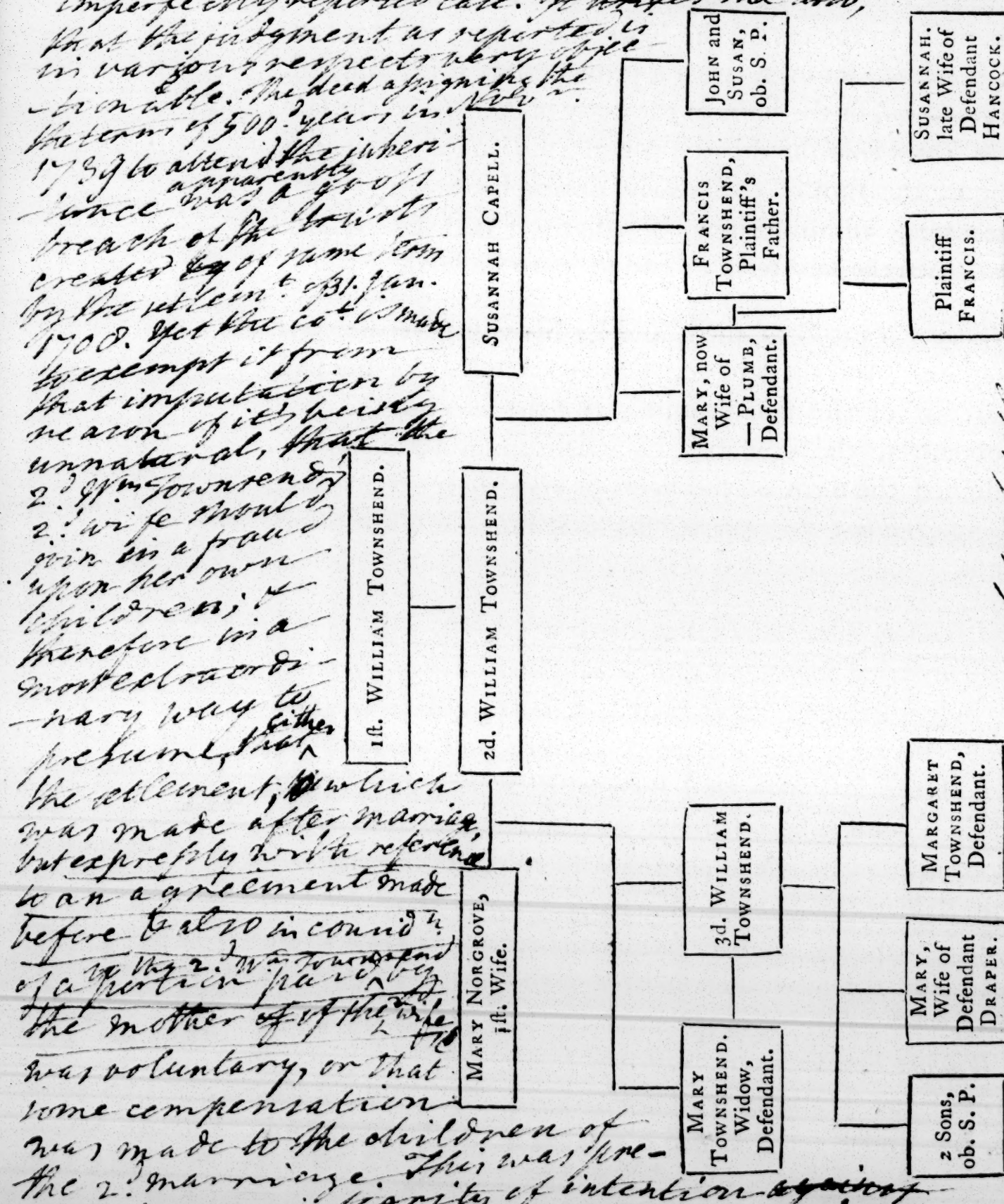
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TOWNSHEND against TOWNSHEND.

FRANCIS TOWNSHEND, - - Plaintiff.

MARY TOWNSHEND Widow, — DRAPER and MARY his Wife, and MARGARET TOWNSHEND. — PLUMB and MARY his Wife, RICHARD HANCOCK, Administrator of SUSANNAH his late Wife. — THOMAS NOTT, personal Representative of RANDOLF STEVENS, (Assignee) Defendants.

[This appears to me a very confused & imperfectly reported case. It strikes me also, that the judgment as reported is in various respects very objectionable. The deed assigning the term of 500 years in Nov. 1739 to attend the inheritance was a gross breach of the law & created a term of years by the act of 1731. 1700. Yet the court made no exemption from that imputation by reason of its being unnatural, that the 2^d Wm. Townshend & wife should join in a fraud upon her own children; & therefore in a most extraordinary way to presume, that the settlement, which was made after marriage, but expressly with reference to an agreement made before & also in consideration of a portion paid by the mother of the wife was voluntary, or that some compensation was made to the children of the 2^d marriage. This was presuming an integrity of intention against the direct evidence of a gross fraud, & upon a deed not so much as hinting at anything like the facts presumed. We know by experience, that parents often transact the affairs of their children made on their children's behalf, & would be a continual opening for sanctioning improper conduct, if because it was gross & unnatural, a presumption were to be raised in avoidance of such settlements, that this is only part of what may be objected to this strange case. J. H.]



THE

1783.

THE first *William Townsbend*, being seised in fee of the lands in question, upon the marriage of the second *William Townsbend* (his son) with *Martha Norgrove* his first wife, by indenture dated 27 June, 1701, between the 1st. *William Townsbend* and the 2d. *William Townsbend*, conveyed the land to *Nehemiah Norgrove* and another trustee, to hold the lands to them and their heirs to the use of the 1st *William Townsbend*, his executors, administrators, and assigns, for and during the term of 500 years, subject to the proviso thereafter contained, with remainder to the use of 2d. *William Townsbend* for life, remainder to the use of the heirs of the body of the said *Martha Norgrove* by said 2d. *William Townsbend*, remainder to the use of the heirs and assigns of said 2d. *William Townsbend*, for ever, with a proviso that if the said 2d. *William Townsbend*, or the heirs of the body of *Martha* by the said 2d. *William Townsbend* should pay to said 1st. *William Townsbend*, or his assigns, the sum of 50*l.* yearly, during his life, and 500*l.* to the executors, administrators, or assigns of said 1st. *William Townsbend*, then the said term of 500 years to be void.

First *William Townsbend* died, and by his will gave the 500*l.* to his daughter: And the said 2d. *William Townsbend* having paid off the arrears of the said annuity, and the said sum of 500*l.* to the executrix, the executrix by indenture of 29th January, 1708, assigned the term of 500 years to *Ann Ashworth* in trust, for said 2d. *William Townsbend*, his executors, administrators, and assigns.

Second *William Townsbend* (after death of his 1st. wife *Martha Norgrove*), married *Susannah Capell* a daughter of *Ann Ashworth*, and, by indenture made after marriage, bearing date 31 January, 1708, between 2d. *William Townsbend* and the said *Ann Ashworth* of the first part, and *William Rowland* and *Nathaniel Rowe* of the second part, whereby, in consideration of marriage, and of a competent marriage portion paid by said *Ann Ashworth* to said 2d. *William Townsbend*, and in pursuance of an agreement made before such marriage, and for settling the residue of said term of 500 years for the uses therein-after mentioned, the said 2d. *William Townsbend* and *Ann Ashworth* (by his direction) assigned to said *William Rowland* and *Nathaniel Rowe*, the residue of the said term of 500 years, in trust for said 2d. *William Townsbend* for life, remainder for *Susannah* his wife for life, remainder in

between trustee and *cestui que trust*, not against a trust by implication as affected by an equity.

May 26th, 1783. Lords Commissioners *Ashurst* and *Hotham*.
A mortgage term being made the subject of a settlement after marriage with a second wife, but recited to be in pursuance of articles previous to the marriage; (the settlor having children by the deceased wife) under the uses of which the plaintiff claimed; was afterwards conveyed by the settlor and his wife, (by fine and settlement) to uses, for the benefit of the children by the first marriage, who, and their representatives have been in possession 30 years: plaintiff's bill dismissed, as the Court will presume that the former settlement was known to be voluntary; or the children by the 2d. wife, to have had a compensation for their claims.

The rule that a trust is not within the statute of limitations, applies only,

But quare.

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trust for such child or children of them, as the said 2d. *William Townshend* should by will appoint, and, in default of appointment, for the 1st. son of said 2d. *William Townshend* on the body of his said wife, and the heirs of his body; remainder to 2d. 3d. and other sons; remainder over. The 2d. *William Townshend* had issue by *Susannab Capell*, *Francis* (plaintiff's father) who died in the life-time of said 2d. *William Townshend*, and left plaintiff his only son.

The said 2d. *William Townshend* had issue by *Martha Norgrove* his 1st. wife, 3d. *William Townshend*, who married *Mary* the defendant, ^{*Mary Townshend the widow.*} and by indenture of lease and release dated 26th and 27th of November, 1739, between 2d. *William Townshend* and *Susannab* his then wife, of the first part; 3d. *William Townshend*, of the 2d. part; and *Greenbank* a trustee of the 3d. part; and by a fine with proclamations levied by 2d. *William Townshend* and *Susannab* his wife, and 3d. *William Townshend*; the said 2d. *William Townshend* and *Susannab* his wife, in consideration of 400*l.* to the said 2d. *William Townshend*, paid by the said 3d. *William Townshend*, conveyed the said lands to *Greenbank*, his heirs and assigns, to the use of the said 3d. *William Townshend*, his heirs and assigns for ever, with covenants in the release by 2d. *William Townshend*, that the said premises were and should be free from incumbrances by him; and by deed-poll, dated the 23d of November 1739, and indorsed upon the said indenture of the 31 of January 1708, reciting in part the said indenture of lease and release and fine, and that the uses of the said indenture of the 31 January 1708, were thereby defeated, and that *Nathaniel Rowe* was dead; the said *William Rowland*, by the direction of the said 2d. *William Townshend*, and 3d. *William Townshend*, assigned to *Randolph Stevens*, the said premises for the residue of the said term of 500 years, in trust to protect the uses limited of the said premises by the said indentures of lease and release.

*There whether
23^d is not a
wrong date; for
how could a deed
of 23. Nov.
1739. recite
uses of lease
& release of
dated 26. &
27. Nov. of
same year, that is, two deeds not made till afterwards?*

*Not explained,
when 2^d William
Townshend & his
2^d wife Mary Capell
died.*

The 3d. *William Townshend* died in 1755, having, by his will dated in 1751, devised the said premises to the said defendant *Mary Townshend*, his wife for life, without any remainder over. He left *Mary Draper* and *Margaret Townshend*, his daughters and co-heirs, and the mother and two daughters afterwards joined in suffering a recovery of the premises, and had settled them to the use of the mother for life, with remainder as to one moiety

moiety to one daughter, and the other moiety to the other daughter ; and the mother had been in possession ever since.

1783.

(a)

The plaintiff went abroad immediately on his coming of age, and did not return till the year 1775 ; he claimed by his bill, to be entitled to the benefit of the term, under the indenture of 1708, and prayed that all deeds might be delivered unto him, and that *Randolph Stevens* might assign the residue of the term to him, and that he might be let into possession, and for an account of rents and profits.

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(a) see pedigree
in page 550, which
explains to have
been Francis
Townsend only son
of their father Francis
Townsend eldest
son of the 2^d Wm.
Townsend by his 2^d
wife.

It was contended by Mr. *Mansfield*, for the plaintiff, that the whole interest in the term vested, under the indenture of 1708, in plaintiff's father as tenant in tail of personal property ; and that the indentures of 1739 were therefore void. Two objections were made to the plaintiff's claim. First, that the indenture of 1708 was made after marriage, and was therefore voluntary. 2dly, that the plaintiff was barred by length of time. As to the first objection, the indenture of 1708 recites that it was in pursuance of articles entered into before marriage. At this length of time, the Court will not presume it otherwise. As to the second objection, the whole transaction was a fraud ; and therefore the statute of limitations is out of the question. The trustees conveyed the term, by the deed poll of 1739, as a satisfied term. It is impossible to contend that the parties did not know it to be unsatisfied. Plaintiff's father was an infant, and therefore could not be satisfied as to his interest. A trust is not within the statute of limitations ; but the trustees under the indentures of 1739, having notice, ought to be considered as trustees for the plaintiff.

Mr. *Kenyon*, for the defendants.—It is rather a difficult presumption that the second wife joined in disinheriting her own issue in favour of the children of the first. The term was, in its creation, in effect, a mortgage, and the question is whether the mortgage is still a subsisting charge.—The indenture of 1708 was voluntary, being after marriage: the recital is not even that the articles were in writing; but if they were so, it is no evidence to affect my client.

Then, as to the statute of limitations: In 1749 the title accrued, to a person capable of making his claim: he does make it

1733.

TOWNSHEND
again
TOWNSHEND

in 1779. The Court will always presume a mortgage satisfied at that distance of time. It would be clear, in a court of law, and when once the statute of limitations begins to run, no disability of the party shall stop it. It is the common practice, that if the mortgagee gets into possession, and continues in it 20 years, the mortgagor is barred of his redemption; not because the statute has said so, but because it is a convenient and wholesome policy. So in this case, either ground of its being a voluntary settlement, or the length of time is sufficient.

Mr. *Hollist*, on the same side.—The rule that a trust is not within the statute of limitations does not hold in this case. That rule is only between the trustee and his *cestui que* trust. *Llewellyn v. Mackworth, Barnard, 445.*

Mr. *Mansfield*, in reply.—As to the objection of its being a voluntary settlement, recitals in old deeds are always evidence, for the articles are usually destroyed on the execution of the settlement; but if the agreement was by parol, it is good to make a settlement. It cannot, indeed, be enforced against an unwilling party—but, if it be admitted, it is a good consideration for the settlement. As to the statute of limitations, both in the light of a fraud and a trust, it does not affect this case.

Lord Commissioner *Ashburst*.—The first point is that the defendants are purchasers for a valuable consideration, and the settlement of 1708 is voluntary. If this had been all, we should have thought with the plaintiff; but as to the case of the defendants, they claim under the deed of 1739, and have been in possession ever since. It is said, by the plaintiff, that the defendants took the term as a trust, with notice; but it is unnatural to infer a fraud in this case, for the mother must be presumed to defeat the provision for her own children. In this view, one would rather infer that the parties knew that the settlement was voluntary, or that some compensation was made to the children of the second marriage. Then as to trusts being an exception to the statute of limitations: The rule holds only as between trustees and *cestui que* trusts. It is true, that a trustee cannot set it up against his *cestui que* trust: but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both

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Mr. Lin

Car. 125.

Mr. J. H. ...

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Seven yd

James H. [unclear]

next one
four

from a
pencil

define

on King

1845

courts of law and equity preserve an analogy to the statute of limitations.

1783.

TOWNSHEND
against
TOWNSHEND

The case of mortgagor and mortgagee, is a stronger case than this: *Aggas v. Pickerell*, 3 *Atk.* 225: And therefore so doubtful an equity as this, must certainly be within the rule. We therefore dismiss the bill, but without costs.

HOLMES against HOLMES.

Lincoln's Inn
Hall, July
17, 1783.

HO L M E S the father, who was a jeweller, by his will dated in *November*, 1771, gave his son 500*l.* and 2,000*l.* to four unmarried daughters; then gave his son the utensils of his trade (which were of trifling value) and gave the residue of his personal estate to his wife for life, and, after her death, he gave further legacies to his daughters: to some 500*l.* and to others 1,000*l.* and, if any surplus, to be divided amongst all his children who should be then living (there being then seven in all). In 1779 he took his son into partnership with him, and, by the deed of partnership, the stock was to be 3,000*l.* to be brought in equally, and they were to be equally intitled to the profits. The father brought in the whole capital, and it was understood, by the whole family, that he meant to give the son the half of the stock. The children who were of age, by their answer, admitted this; and there was parol evidence of declarations of the testator, at different times, that he meant to bring his son into partnership, and to give him half the stock, and even the whole, and that he told one witness that he had brought his son in, and had given him 1,500*l.* The question made in the cause was, whether this advancement was a satisfaction of the legacy of 500*l.* and it was held not to be a satisfaction, not being *ejusdem generis*; and that it must have been the testator's intention that the plaintiff should have both. Lord Commissioner *Hotbam* relied on an argument for the plaintiff, that if the legacy had been a moiety of the stock, and afterwards 500*l.* had been given, it could not have been a satisfaction.

Father, by
will, gives his
son 500*l.* he
afterwards
takes him
into part-
nership. The
stock being
3,000*l.* this
is not a satis-
faction of the
legacy.

1783.

Lincoln's Inn
Hall, October
29, 1783.

Petition that
a guardian
may be as-
signed (un-
less to carry
on a suit, or
protect an
interest) must
be pursuant
to the statute.

Ex parte BECHER.

THIS was the petition of *Charlotte Becher*, of the age of 17 years, to have a guardian of her person assigned by the Court:—but it was not a petition under the statute.

It appeared that the father had died in the *East Indies*, insolvent; that her mother was alive, and resided there; that no guardian had ever been appointed; that she had no estate either real or personal; and that a very advantageous offer of marriage had been made to her, to consent to which was the object of praying for the appointment of a guardian (she lived with her uncle, by the mother's side, who was also the father's executor). But the Court said, that this, not being a petition according to the statute, and not for the purpose of carrying on any suit, or protecting any interest; there was no object which the Court could take notice of, to entitle the petitioner to what she prayed.

They therefore dismissed the present petition; but directed a new petition to be presented pursuant to the statute, which being done at the rising of the court, an order was made accordingly.

VAUGHAN *against* THOMAS.

Lincoln's Inn
Hall, October
31, 1783.

Taking an
annuity
worth 9
years pur-
chase at 5
years, is an
unconscien-
tious bar-
gain, and the
court will
give the
taker no as-
sistance in a
bargain for
a re-pur-
chase.

THE defendant, General *Thomas*, being in great want of money, came to an agreement with the plaintiff, who was a broker, for the sale of annuity of 300*l.* for his (the defendant's) life, for the sum of 1,500*l.* The defendant then represented himself to the plaintiff to be of the age of 55 years; and the plaintiff accordingly insured the defendant's life, as being of that age. The original transaction was on the first of *December* 1775. In *March* 1777, it was discovered that the defendant was of the age of 61 years, at the time of granting the annuity; but, as the defendant swore by his answer, he did not himself know it at the time. In consequence of this discovery, the plaintiff was forced to pay an additional premium of 7*l.* 2*s.* 6*d.* for the insurance of the defendant's life. On the plaintiff's representing this mistake of the age to the defendant, it was

agreed

agreed that the plaintiff should grant to the defendant an additional annuity of 50*l.* as commencing from the first of *December* 1775; which was accordingly done, by indorsement on the original grant. In that indorsement, the additional annuity was mentioned to be granted for the consideration of 250*l.* but in fact, no money was paid on that occasion. In *December* 1779, the defendant applied to the plaintiff to re-purchase the annuity, and thereupon an agreement was drawn up, in writing, and signed by the plaintiff and defendant, whereby the plaintiff agreed to give up the annuity on payment of 1,500*l.* the original purchase-money, and all arrears then due, deducting thereout the sum of 200*l.* which was understood to be the four years of the additional annuity of 50*l.*; the arrears then due amounted to 475*l.* so that the principal sum then settled for the re-purchase was 1775*l.* After this agreement had been signed, the plaintiff said it was unintelligible, and struck out his name; two days afterwards they met again, and the plaintiff's attorney prepared an agreement, whereby the plaintiff relinquished the annuity, and all arrears then due, for the sum of 2,000*l.* to be paid by instalments, but to carry interest in the mean time. This agreement being signed, the plaintiff brought this bill for the performance of it. It was referred by the Master of the Rolls, to inquire into the circumstances, and to find the value of the original and additional annuity, and the defendant's age.

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It now came on, upon the Master's report; he reported the annuity worth 9 years purchase, when it was first granted. The plaintiff insisted that the whole transaction was fair, and that he was entitled to the assistance of this Court, to carry it into execution.

But the Court said, that if they assisted the plaintiff, they should give a sanction to a very unconscientious bargain; and that under this view of the case, the plaintiff was by no means entitled to the aid of this Court.

Bill dismissed.*

* Vide *Heathcote v. Paignon*, *post.* vol. 2. p. 167.

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Lincoln's-Inn-Hall.

5th and other
days in July
1778, before
Lord Thur-
low: 12th
November,
1783. before
the Lords
Commission-
ers.

Leases for
lives, ob-
tained by
agents of
a deceased
person of
weak intel-
lects, upon
inadequate
considera-
tions, set
aside as
fraudulent.

GARTSIDE *against* ISHERWOOD, and Others.

THE bill was filed by the plaintiff, as heir at law of *John Moss*, esq. against the defendants, to set aside a variety of leases, granted by the deceased to the defendants, as obtained by fraud and imposition.

It stated that, by indentures of 28 and 29 of *December* 1764, being the settlement previous to the marriage of *John Moss*, with *Apollonia Bayley*, the manor of *Little Bolton*, in the county of *Lancaster*, was settled upon the husband for life, without impeachment of waste, remainder to trustees for 99 years, to empower the wife to receive 300*l. per ann.* by way of jointure, remainder to such uses as *Moss* should appoint, remainder to *Moss*, in fee. That *Moss* died the 14th of *December* 1679, aged about 36 years, leaving *Apollonia* his widow surviving him. That *Moss* being of weak understanding, employed the defendants *Isherwood* and *Smedley*, as agents, or stewards under him, who, by fraud and imposition, obtained leases from him at an under-value, several of these were of lands, which had been before demised for terms of years, determinable upon lives, and which by lapse of time or otherwise, had become less valuable, and now were granted for longer terms, upon a greater number of lives, and were granted either to *Isherwood* alone, *Smedley* alone, or *Smedley* and *Isherwood* jointly, on higher terms during the life of *Moss*, (though below their real value,) then to sink to low rents: In particular: that *Isherwood*, being possessed of two leases dated respectively the 31st of *January* 1752, and 31st *December*, 1752 surrendered them, and obtained a lease dated the 20th of *August* 1767, of the same, with additional premises, for 7 lives and 31 years after the determination of the last life, at the rent of 31*l. 10s. per ann.* and upon the 28th of *March* 1769, on surrender of that lease, obtained a new one of the same, with additional premises, for 999 years, at 50*l. per ann.* during *Moss's* life, to drop to 10*l. 10s.* after his decease; it was in evidence, for the plaintiff, that these premises were worth 80*l. per ann.*: That *Isherwood* and *Smedley*, had a joint lease of premises in *Upper Bolton*, for 999 years, at 67*l. per ann.*; it was in evidence that those premises were worth 80*l. per ann.*: That *Smedley*, being in possession of several leases for lives, on the surrender

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surrender of them the 8th of *August* 1767, obtained a new lease, of the same with additional premises, for 12 lives and 21 years, at 58 *l. per ann.* rent, and on the 27th of *November* 1767, on surrender of that lease, obtained a lease for the same lives and 31 years, at 78 *l.* rent during *Moss's* life, to fall to 8*l.*; the value, at this time was, in evidence, to be 63 *l.* and the 31st *December* 1768, upon the surrender of that lease, he obtained a new lease of the same, with additional premises, for 999 years, at 80*l.* 7*s.* 6*d.* *per ann.* rent during *Moss's* life, and then to fall to 8 *l. per ann.*, it was in evidence, that the value of these premises, at the time of granting the last lease, was 94 *l. per ann.*: That upon the 18th of *June* 1768, he obtained a lease of 3 water-corn-mills, and a colliery, for 999 years, at 84 *l. per ann.* during *Moss's* life, to drop to 37 *l. per ann.*; the value of these premises were in proof to be 57 *l.* a year: That on the 20th of *June* 1769, he obtained a lease for 999 years, in a tenement called *Broughton's Tenement*, at 10 *l. per ann.* after the death of *Broughton*, during *Moss's* life, to drop at his decease to 5 *l. per ann.*; it was proved that the premises were of the value of 11 *l. per ann.*

The cause was heard on several days in *July* 1778, when a great quantity of evidence was read.

Mr. *Attorney General*, Mr. *Mansfield*, and Mr. *Kenyon*, for the plaintiff, insisted that these leases were evidently fraudulent, merely from the inequality of the consideration upon which they were granted; that the real value of the estates were much beyond the utmost reserved rent upon each lease: that *Smedley* and *Isherwood*, were stewards or agents of Mr. *Moss*, and that Mr. *Moss* was a weak man, easy to be imposed upon; that it was the duty of the stewards, to turn their sagacity to the advantage of their employers; and not to their own advantage, in opposition to his; and that, upon these grounds the plaintiff was clearly intitled to the relief sought by his bill.

Mr. *Price*, Mr. *Madocks*, Mr. *Bolton*, and Mr. *Parker*, for the defendants, contended that the bargains were neither unfair nor unequal; and to prove the last they produced a variety of calculations, they also contended that *Moss* was not a weak man, that *Smedley* and *Isherwood* were not his agents; that he disliked the *Gartside* family, and wished to increase his income by granting such

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such leases: that the matter was publick, and similar leases were granted to others; they besides objected to the length of time before the bill was brought; Mr. *Moss* having died in 1769, and the bill not having been filed till 1776. This delay the plaintiff excused by throwing it upon his attorney; by shewing that, upon the death of *Moss*, he had given immediate notice to the defendants of his intention to impeach the leases, and that he had actually brought an ejectment and recovered under an old term; but had been restrained, by injunction, upon a bill filed by the defendants. After the arguments the 25th of July 1778.

Lord *Chancellor* broke the case as follows,—If the real value of the estates, at the time the bargains were made, the number of years purchase at which lands then usually sold in that part of country, and the value of the incumbrances affecting the estates, at the times the bargains were made, had been accurately stated, it would have been easy to have decided whether the interest obtained by the defendants, subject to those incumbrances, has been sufficiently paid for; but it is not tolerably manifested what were the value of the lands at the time when the several leases were made, or what was the number of years purchase for which estates then usually sold in that country, or what was the value of the incumbrances affecting the estates. It is, therefore, impossible to state with any accuracy, the disproportion between the real value of the purchase, and of the thing given for the purchase. Upon the whole, however, there appears strong ground to presume fraud. The jurisdiction of the Court in cases of this nature, cannot be so defined as to stand on very accurate principles. The case of *Filmer v. Gott*, 7 *Brown's Parlt. Ca.* 70. mentioned by Mr. *Attorney General*, is a very strong one, and has been approved by a decision of the House of Lords. The only principle, upon which that case could be supported, was that if a confidence is reposed, and that confidence is abused, a court of equity shall give relief. It used to be held, that a contract ought not to be set aside, merely for inequality in the bargain, or merely upon the ground of the weakness of the person, from whom the contract has been obtained, 3 *Wms.* 130. But the Court has since gone farther; the only principle which I can at all fix, is that wherever it appears that fraud has been practised, there the contract, however valid at law, shall not stand in this Court. Fraud may be collected from circumstances; one circumstance, from which fraud may be collected, is gross inequality;

equality; this may be attended with the additional circumstance that one of the parties confided in the other, or was pressed by necessities, which disposed him to give way to the other; but in all the cases, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to have been in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality: And the turn of the scale must be considerable against the person who has the legal estate. There is no method of marking any line but by making it necessary to prove gross inequality. There is an objection to the relief sought by this bill, arising from the delay in seeking the relief; this is no objection for the time whilst *Moss* lived, but he died in 1769, from 1769 to 1776, the plaintiff was dormant; he brought an ejectment, and the present defendants filed a bill for an injunction, the injunction guarded the possession, and the defendant in that suit put in no answer, till after the present bill was filed; if an answer had been put in, shewing this strong case of fraud, the injunction I apprehend must have been dissolved; though the ejectment was brought upon a satisfied term. From that time the estates have been publickly letting, part upon building leases. It is necessary to consider the time the plaintiff has laid by, as an objection to his claim; but if he shews strong evidence of fraud, it will be hard to say that this length of time shall be sufficient to bar him of his remedy. As to the other grounds upon which this transaction is endeavoured to be impeached, it is clear *Moss* was a weak man, from the evidence on both sides. It is equally clear that his weakness was not such as to be a ground for a commission of lunacy, or to impeach his acts at law; the witnesses for the plaintiff, state him to have been stupid and foolish to the highest degree. The instances produced, though in themselves ridiculous, yet being produced by fair people as satisfying their minds, are sufficient to convince me of his weakness; one of the witnesses says he was not so bad as he was generally thought to be, that he could write letters and transact ordinary business: this shews he was generally considered as a weak man. On the other side it is attempted to prove that he was a man of strong understanding, attentive to his affairs; the instances are absurd: there can be no doubt, that his understanding was below that of the generality of men. As to his health, it is impossible to say,

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the habit of his health gave many symptoms of a quick decay: but there is full evidence, that he was not thought in a good state of health. The contract is not to be considered as made in expectation of sudden death, but, in expectation of a good bargain from indifferent health. As to the relation in which the parties stood, it is evident *Isberwood* had a yearly salary; a lease of lands worth 11 *l.* a-year was granted to him at 6 *s.* a-year, and this he himself defends as granted to him for services done: That *Smedley* was a person confided in by *Moss*, is clearly proved by all the defendant's witnesses, as far as confidence went; therefore, both the defendants stood bound to behave fairly and clearly towards him: and it seems to have been the policy of the law, not to permit any persons, so circumstanced, to take any such advantage. The defendants assert, that *Moss* was not imposed upon, but acted from the mere impulse of his own mind; they suppose him to have had an aversion to his heir, an heir, whom he might, if he pleased, have disinherited. Consider the state of body and mind of a man, who in 1767, aged about 30, and married only in 1764, to a young wife, despaired of having issue, and therefore desired to deprive his heir of an estate of which he was seised in fee. Upon the material subject, the value, the terms seem such as will hold equally to the principle, but the facts are not sufficiently stated for me clearly to make a decision. I propose therefore, to send it to the Master, to enquire into the value of the lands, and the consideration given by the defendants. Upon reference, the Master will distinguish the improved value which has arisen from money expended, from that which has arisen from the improveable nature of the lands: for it is monstrous to suppose, as has been contended for by the defendants, that, the improveable nature of the estate is not to be considered as an advantage, for which a price should have been paid. Though it is clear that *Moss* was imposed upon, I wish to have it appear how much he was imposed upon.—It is alledged, that leases for three lives are common in that country, but there is no proof that leases for 999 years are common, or that it is common to let a whole manor in such a way, with power to dig coal and every sort of mineral except lead, I have no hesitation to pronounce, that the case is carried as far as preparation can go, before actual information is obtained. The relation between the parties is proved; the defendants were clearly persons intrusted: the weakness of *Moss* is evident; his state of health

was

was clearly such, that his life was not to be estimated at the ordinary value of a life of 34.—There is also a strong ground from the evidence to believe that there was gross inequality in the bargain; but I send it to the Master, because the evidence has not shewn a distinct disproportion.

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The counsel for the defendants objecting to the delay and expence, which, they alledged, would attend the going before a Master, desired that an issue might be directed and proposed an issue to try whether the contracts were entered into upon fair and valuable considerations.

The *Chancellor* said that, if a jury found the contracts were entered into upon fair and valuable considerations, he certainly should not attempt to set them aside. But this issue appearing to be inconclusive, if found for the plaintiff, he ordered the cause to stand over till the 28th.

On the 28th *July*, Lord *Chancellor*, said, in this case, every circumstance which, combined with a gross inadequacy of consideration, induces a court of equity to set aside deeds as fraudulently obtained is clearly made out; but, whether the considerations on which the leases were granted, were adequate or not does not fully appear; on one side, it is insisted that they are grossly inadequate, and strong evidence of this is given; on the other side, the contrary is asserted; and they have offered an issue upon that fact. If the consideration was perfectly adequate, there would be no possibility of setting aside the contract; there are cases indeed, in which the example and concern for the publick have been considered, as having weight; the abuse of confidence is also a circumstance; but the only evidence that this confidence has been abused, is a gross inequality in the contract, I therefore proposed to refer it to the Master to look into the instruments, and to enquire into the considerations, whether adequate or inadequate, and how far inadequate; but the defendants have offered an issue: In this they have gone beyond my idea, for if the consideration was not perfectly adequate, yet if it was not very inadequate, I saw no grounds to set aside the contract; the consideration being simply inadequate, is not alone sufficient; combined with many of the circumstances of this case it would not be sufficient; the degree of inadequacy necessary to invalidate a contract, will be very different

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different according to the circumstances of each particular case. The agreement for the coals, has many additional circumstances, which the other contracts have not: It gives an interest which over-rides the whole manor; there is a power to get every sort of mineral, *except lead*, without restriction; the lessor is perpetually bound to keep the water courses in repair; if the coal-mines are unproductive, the lessor gets nothing, if they are worked to the greatest advantage the rent can never exceed 25%. if they produce less, the rent is to be proportionally less. But the circumstances of the contracts, the character of the man, the situation in which the parties stood, are matters merely for the decision of a court of equity. Where a matter of law arises, there it is proper for me to send the parties to the courts of law; where a matter of fact is necessary to be considered, and there is doubt upon the evidence of the fact, there it is proper to send a neat matter of fact to the decision of a jury. It will, therefore, be improper to direct the issues in the manner mentioned by the defendants, whether the contracts were entered into upon fair and valuable considerations, for this will leave all the circumstances of the case to be decided upon by the jury, and will put it upon them to exercise the peculiar jurisdiction of a court of equity; the issues must, therefore, be, whether the considerations of the several deeds were fully adequate to the interests gained by those deeds. The inadequacy of the consideration must be the basis upon which the court is to grant the relief prayed by the bill; the thing to be inferred, from the inadequacy of the considerations, is fraud: inadequacy is evidence of fraud: for that purpose, it must be gross; but in some circumstances it must be greater than in others, and how far the considerations must be inadequate, to entitle the plaintiff to relief, must be for the consideration of this court: I, therefore, thought it more adviseable to refer the matter to the Master: but as the defendants have prayed an issue, and have boldly offered to abide the event, I cannot refuse to grant it, and they must take it in the manner I have mentioned.

An order was accordingly made that the parties should proceed to trial at the next *Lent* assizes for *Lancashire*, upon five issues, whether the considerations given for the leases, mentioned in each issue, were adequate to the interests acquired, and in those issues, the defendants here were respectively to be plaintiffs, and the plaintiffs here defendants.

These issues produced three records for trial at the assizes; in the first *Smedley* was plaintiff, for trial of three issues directed, between the plaintiff and him, on the value of his three leases; in the second, *Isherwood* and *Smedley* were joint plaintiffs, on the joint-lease; and, in the third, *Isherwood* was plaintiff. In the first and second of these the jury gave verdicts for the defendant at law, against the validity of the leases; and the third record was withdrawn.

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The cause came on again the 29th *August* 1779, when, upon affidavit of the three records being made up, and the last being withdrawn, judgment was ordered to be taken *pro confesso* against the plaintiff at law on that issue.—Motions were afterwards made for new trials, but refused, on account of the length of time that had passed before the application.

There were afterwards several proceedings had in the cause, in consequence of the deaths of parties; and it came on, upon the equity reserved, before the Lords Commissioners, 12th *November* 1783, when the Court ordered the leases against which the jury had found verdicts, and comprised in the record upon which judgment had been taken *pro confesso*, to be set aside, as obtained by fraud; and the leases surrendered at the time of taking the same, and other unimpeached leases to be restored to the defendants.

Bishop of PETERBOROUGH against MORTLOCK.

DR. *Goddard* Master of *Clare-Hall*, Cambridge, by his will, gave several pecuniary legacies, and then “to *A.* 100 *l.* “to *B.* 100 *l.* &c. &c. to *Storey’s Hospital*, 3,400 *l.* in the 3 *per cents.* the annual dividends of which to be every half year divided betwixt four widows.”

It appeared that, at the time of making his will, and at the time of his death, he had only 2,200 *l.* standing in his name in the 3 *per cent.* annuities, of which 150 *l.* belonged to other persons, as he had declared by a writing in his own hand; but the

Lincoln’s-Inn-
Hall, Febru-
ary 20th,
1784.

Bequest to an
hospital of
3,400 *l.* in
the 3 *per*
cents. the di-
vidends to be
divided a-
mong 4 wi-
dows, this is
a pecuniary
not a specific
legacy.

See 2. Bro.
Cha. Cas. 108.
3. Feb. 1784.
310.

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remaining 2,050 *l.* belonged to him in his own right. There being a deficiency of assets, the question was whether this legacy of 3,400 *l.* in the 3 *per cents.* was to be considered as a specific legacy, or as a pecuniary legacy, and consequently to abate.

Mr. *Mansfield* and Mr. *Graham*, for the plaintiff.

Mr. *Attorney General* and Mr. *Le Blanc*, for the defendant.

The cases cited were,

Ashton v. Ashton, *Forrest* 152. *Purse v. Snaplin*, 1 *Atk.* 414. *Sleech v. Thorington*, 2 *Vez.* 560. *Avelyn v. Ward*, 1 *Vez.* 425.

Lord *Chancellor*,—In this case, I confess it does not appear to me that there is any question of difficulty.—On the face of the will, it is clearly a pecuniary legacy;—and if it is to be turned into a specific legacy, it must be upon other circumstances.—The form of the bequest is to give 3,400 *l.* in the 3 *per cents.*—The testator has been definite in applying the quota of maintenance to each widow.—On the face, therefore, of the will, it is purely pecuniary, and extends only to a direction to buy such a sum in such a stock.—But it is said, that although this may be so in the words, yet that circumstances may be given in evidence, as to the state of the funds in his possession at the time of making the will.—If he had at the time of making his will, more stock, than that which he devised, it is said, it will be a specific legacy; but that this is not the only case in which the Court has been used to make this inference.—when I say this, I do not mean to be understood that the Court has laid it down as a positive rule of law; but merely as an interpretation of evidence. In the case of *Ashton v. Ashton*, the argument did not turn upon its being a specific legacy or not, (which seems taken for granted) but merely upon the consequences of its being specific; if that case had applied more to the present, I should have thought it necessary to have looked more into it.—In all cases where the legacy is considered as specific, the Court takes for granted that the testator meant that particular fund, although he may be mistaken in the description of it; now this intention ought to be made out by strong circumstances, which certainly do not exist in the present case.—I am, therefore, of opinion, that this is

a pecuniary legacy; and must, consequently, abate in proportion with the rest.

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Note, that according to a case said before me with copies of two opinions of Sir John Elliotford upon it, Sir John mentions, that the decree in this case directed the master to inquire the

*market price at the date of the decree, which was to be considered as the amount of the legacy given to the charity. In however, the order at the Rolls in *Simmons v. Allance* 4. Pro. Cha. Cas. 345.*

ADAMS against WEARE.

*the order of Lord Thurlow in *Blackshaw v. Rogers* cited *ibid.**

Easter Term,
May 3d, 1784.

APPEAL from the ROLLS.

349. Is further 3. Ks. Jun. 629.

BILL, brought by the vendor against the vendee, for a specific performance of an agreement.

The contract was a memorandum, signed only by the defendant, to the following purport: That the vendee agreed to buy of the vendor the premises in question, provided he would convey them to him, and make a good title thereto. The vendor took a guinea of the vendee, by way of earnest.

The vendee, by his answer, suggested that he had agreed to buy the premises conditionally only, viz. for the purpose of working a mill which he intended to erect upon the lands, provided he could obtain the consent of the corporation of *Bristol*; and that, in consideration of these circumstances, he agreed to give a very large price, more than 60 years purchase, for the lands; but that, upon application to the corporation, they refused their consent, by which he was prevented from erecting his mill: he therefore, refused to perform the contract, insisting that his agreement was conditional, in case he could obtain such consent; and, having failed therein, he was not bound to purchase the lands at such advanced price.

B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of a corporation is necessary; but A. refuses to treat on condition: B. fails in obtaining consent: This failure in his speculation, is no defence against a bill for specific performance.

There was evidence, in the cause, of these circumstances, and that the purpose of building the mill, which depended on the consent of the corporation, was in the view of the vendee, but not that it was in the view of the vendor, and, so far from having agreed to such condition, the vendor had never mentioned it.

The late Master of the *Rolls* had decreed for the plaintiff.

Upon an appeal.

On the part of the plaintiff, it was argued that there was an express agreement in writing, and as to the hardness of

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of the bargain, there was no fraud or surprize: It was a well considered contract, and however hard the bargain might appear, the party contracting for the purchase did not at the time think so. The Court must consider the thing as done; and supposing the contract to have been executed at the time when the agreement was made, the Court would not set it aside. *Mortimer v. Capper*, ante p. 156. *Cass v. Ruddle*, 2 Vern. 280. where the premises had been destroyed by an earthquake.

For the defendant, it was contended, that the bargain, as circumstances had turned out, was hard and unconscionable; that the proposals and conditions were not adhered to; and that the Court could not carry the agreement into execution; but if the plaintiff was to have any remedy, it was at law upon an action of covenant: that there are instances where the Court, on an agreement executed only on one side, had refused to decree a performance, *Bromley v. Jefferies*, 2 Vern. 415. So in a case where the articles appeared to be unreasonable, *Young v. Clerk*, Pre. Ch. 538. so where the lands turn out to be other than the purchaser supposed them to be, *Hick v. Philips*, Pre. Ch. 575. Where a bargain is good at the commencement, but turns out a hard one afterwards, the Court will not decree a performance. *Stent v. Bailis*, 2 Wms. 220. as in case of an house which is burnt down before the conveyance, *Pope v. Roots*, 7 Bro. Plt. Ca. 184. and a case mentioned by Sir Joseph Jekyl. So where a bargain has become oppressive, it is in the discretion of the Court to relieve, *Chesterfield v. Janssen*, 1 Atk. 301. *Barnardiston v. Lingood*, 2 Atk. 135. *Buxton v. Cowper*, ib. 383. In this case the purpose has failed, and as the agreement was merely executory, it ought not to be executed.

Lord Chancellor,—It is very material, in this case, to attend to facts. I am not very anxious to discuss the point what bargains the court will execute or not; but when the court has laid it down, as an article of the equity which men shall obtain here, and which they cannot obtain at law, that instead of damages they shall have a specific performance; and that every agreement must be performed, unless something at the time of making the bargain, or something done since is to amount to a waiver of it, at the time of carrying it into execution; if you do not confine yourself within that limit, there are no bounds whatsoever: for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable;

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scionable; which expressions, unless they are properly applied, mean little or nothing. This bargain, if impeached, must be so at the time of its commencement; for nothing has happened since to impeach it, unless that the party has failed in his speculation in respect to a bargain which he made with his eyes perfectly open. It is perfectly necessary to see what were the real terms of the bargain. On the 11th of *March*, overtures were made concerning the purchase of these lands by *Weare*. 800 *l.* was demanded as the price for the estate, putting that value upon it in contemplation of building the mill, and other articles of no moment now; unless the erection of the mill, was the real ground upon which the price was carried to the extent it was. It was insisted, it cannot be carried into execution, because it is proved that the price was more than three-fourths more than the value; but, for what I know to the contrary, it may be the value. After the 11th of *March*, no answer was given to that letter; but *Weare*, in order to get a farther treaty, applied to a Mrs. *A.* as a relation of the family, to go with him, and take *Adams* aside, and ask him, in privy, the lowest price he would take; which she did, and he made the same demand as before: and some days afterwards, *Weare* went again to *Adams* with Mrs. *A.* to treat with him. As to the objection, that this is the evidence of relations; I think it is fair and unimpeachable evidence. They went to *Adams* before dinner, and conversation was had in regard to the improvement by building a mill, which is beyond doubt; and the price was reduced to 740 *l.* Mr. *Weare* agreed to give the price, and to build the mill, *if* he could get the consent of the corporation; and the single suggestion mentioned was the consent of the corporation. Mr. *Adams* said I will have no *If*; it shall not be conditional; the business shall be all yours to get that consent. *Weare* was an alderman of the corporation, and he had interest; but *Adams* had none. The price was settled upon an express acceptance of the estate; and *Adams* would have nothing to do with any conditional bargain, as to obtaining the consent of the corporation. After dinner the agreement was made out; and it is suggested that it was intended as a *conditional* bargain, though the evidence has proved the contrary, and the agreement is written without expressing any thing upon the application. *Adams* was the person to draw the agreement; and he observed, we must be upon honour, and no advantage to be taken of the condition. It is impossible, if that conversation had related to such a condition, he should not mention it in the writing.

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against
WEARE.

writing. He knew himself to be incapable of executing any such condition, and therefore the conversation related to the mere form of drawing out the writing.—Thus the matter rested till the 22d of *March*, when *Weare* wrote to *Adams*, to inform him that he had wrote to Mrs. *Day* (tenant to the corporation), to whom the erection of the mill would have been injurious, and as her consent could not be obtained, the bargain was off. It struck me strange that he should confine himself to Mrs. *Day* and say nothing of the corporation; but the evidence says, that he was informed, by him, that he had made this bargain, and proposed purchasing lands on the other side of the river, with her consent; but that was not made one of the terms, because he thought himself sure of her consent. When I consider the evidence, and upon what consideration this consent was to be had, I am sure he made no doubt of obtaining it; but the surveyor said it would be of prejudice to Mrs. *Day*; when the consent was denied him. The question is, what he has done to obtain the consent of the corporation, could he or could he not have obtained Mrs. *Day*'s consent, if he had offered her a premium for any imaginary damages that would have arisen to her by his building the mill. The burthen lay upon *Weare* to obtain that consent; it was his part to have done so: but there is no evidence of accommodation, on his side as to that point, for it only says he applied to Mrs. *Day* and she refused her consent, but nothing is mentioned as to a premium being offered by him. Suppose he had obtained her consent, and the corporation had been mentioned; when it was an express part of the case, that the owner should not have been answerable, there appears rather to be fraud on the part of the defendant, for he had no authority to think so. It has been said, stating the answer given, to that letter by *Adams*, that there is something in it, because he does not expressly deny that he could not obtain the consent. In reply, he only insists upon the agreement, but does not charge it in the manner it is done on the other side. It does not appear how this consent may be obtained; for if he can obtain it, the agreement may still be executed. It does not appear to me what the value of the premises would be, if applied to the purpose of working the mill. What the advantage of it might be, is not stated; therefore I think that, without entering into the particulars of the case, the Master of the *Rolls* has done right, for no case can be cited where parties have made a bargain with their eyes perfectly open and no surprise whatsoever, as in this case, in which the court has refused to

to decree a specific performance. Here is no mistake of the object, as in *Hick v. Philipps*; and as to the greatness of the price, *Adams* had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill; for he went upon the notion of that, that he was sure of Mrs. *Day's* consent, and, if so, of that of the corporation.

Decree affirmed.

1784.

ADAM'S
against
WEARE.

OLIPHANT *against* HENDRIE.

May, 1784.

A. By will, gave the sum of 300*l.* to a religious society in *Scotland*, to be laid out in the purchase of heritable securities in *Scotland*, and the interest thereof to be applied toward the education of 12 poor children.

Money to be laid out in the purchase of heritable security in *Scotland*, not within the statute of mortmain.

It was contended to be a void bequest, within the statute of mortmain, analogous to land, as being a bond that would descend to the heir of the obligee.

But Lord *Chancellor* held it to be a good bequest.

BIRCH *against* CORBYN.

Lord *Thur-*
low.

Lincoln's Inn
Hall,
24th. May,
1784.

*T*HE plaintiff *Birch* had filed a bill, claiming an equitable lien on certain stock purchased with money remitted by Mr. *Corbyn* from *Virginia*, in respect of money laid out and paid by the plaintiff, for the use, and in the education and payment of the debts of three of Mr. *Corbyn's* sons, who had come over to *England*, and applied to the plaintiff for that purpose; which money the plaintiff charged by his bill was remitted for the purpose of satisfying his demands. The stock stood in the names of *Corbyn* and *Atharwes*, in trust for *Corbyn*. The bank, hearing of this suit, refused to permit a transfer of the stock.

The question being whether the plaintiff has a lien upon stock, the Court will not order the bank to permit a transfer.

It

1784.

BIRCH
against
CORBYN.

It was now moved on the part of the defendant, that the bank might be ordered to permit a transfer, but

Lord *Chancellor* said, this was in fact requiring a decree in the cause, by an interlocutory order; for the defendant undertakes to prove that the plaintiff has no lien on this stock; and this is to be made out by reading the answer, which could not be read by the defendant upon hearing the cause. It is impossible to make an order upon the stake-holder to quit the stakes, which is the main object in dispute in the cause.

WELLER against SMEATON.

Lincoln's-Inn-
Hall, 27th.
May, 1784.

Bill to be
quieted in
possession of
a mill; and
that defen-
dants might
pull down
works about
it and be re-
stricted from
erecting
others:
demurrer
because
plaintiff had
not establish-
ed his right
at law, al-
lowed.

THE plaintiff, who was lessee of an antient mill on the river *Ravenburne*, filed his bill against the defendant, stating his own title, and charging that the defendant had erected certain flood-gates, and other works upon the said river, above the plaintiff's mill, for the purpose of conveying the water of the said river to *Deptford* and *Greenwich*; whereby the plaintiff's mill was obstructed, and that defendant had no right to erect such works: &c. and praying that the plaintiff might be quieted, by the injunction of this Court, in the possession of his mill, and that the defendant might be decreed to pull down his several works, and be restrained by injunction from building any other works, &c.

To so much of the relief prayed as required the works to be pulled down, and the defendant to be restrained, &c. the defendant demurred, for that the plaintiff ought to have established his right at law, in the premises, before he required the aid of this Court.

Mr. *Mansfield*, Mr. *Madocks*, and Mr. *Stanley*, for the plaintiff.

The case of *Busb v. Western*, *Pre. Ch.* 530. proves that this kind of suit is properly brought in this Court, in the first instance, without being driven previously to law. It is analogous to the cases of diverting water-courses, which this Court has expressly made a head of equity. There are several cases in *Viner Tit. Chancery*, So *The Mayor of York v. Pilkington*, 1 *Atk.*

282. *How v. Tenants of Bromsgrove*, 1 Vern. 22. *New Elm Hospital v. Andover*, 1 Vern. 266. Besides, this demurrer being merely to the relief, a full discovery is now obtained; and it will put the parties to a new and unnecessary trouble and expence. It is not at all the same case as where a plaintiff applies for an injunction.

1784.

WELLER
against
SMEATON.

Mr. Scott, and Mr. King, for the defendants.

This Court will never permit a bill of this kind until the right is established at law, for this is a dispute between two individuals, respecting a right in which no third person is concerned, and therefore cannot be said to prevent any multiplicity of suits; Lord *Teynham v. Herbert*, 2 Atk. 483. *City of London v. Perkins*, 4 Bro. P. C. 157. *Vin. Tit. Chan.* 425. pl. 35. *Whitchurch v. Hide*, 2 Atk. 391.

Lord Chancellor,—I take it to be a head of equity to interpose, by way of injunction, when a party is erecting new works upon an old possession; but when the works have been permitted to remain three years, that it is considered as such a laches, as to preclude the party from having relief here, without going first to law. In this case, it has been put upon this ground, that it is within the equity of this Court, to take, *ex ab origine*, a question whether or not a right is violated. It struck me immediately, from a general recollection of the cases, that the Court have exercised no such jurisdiction. There are two ways in which applications to this Court have been made in this kind of cases; First, in order to compel the party to try the right, which was one part of the case of *Welby v. The Duke of Rutland*, 7 Bro. 755. in the House of Lords: Secondly, To prevent a multiplicity of suits, which was a point in the same case; most of the cases on the subject had been looked into upon that occasion, and it was found that in no instance except that of *Busb v. Western*, this Court had ever interposed in a mere question of right between A. and B. they having an immediate opportunity of trying the right at law, which would be definitive. If, after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this Court to interpose by way of injunction, but merely when one party claims, and another denies a right, it is impossible for the Court to entertain the bill.

Demurrer allowed.

1784.

*Lincoln's-Inn-Hall,**May, 28th.*

1784.

Subsequent interest on a mortgage to be calculated upon the principal and interest reported due; but upon bonds or legacies, on the principal only.

PERKYNs *against* BAYNTON.

IT was agreed by the counsel on both sides, and by Mr. *Dickins* the register, that when subsequent interest was directed to be computed, it was the course of the Court, in case of a mortgage, to compute such interest on the principal and interest reported due; but in cases of bonds or legacies, to compute it on the principal only, and that this was established by Lord *Macclesfield*, in a case reported in *Peere Williams* (1 *Wms.* 453.) † This was the case of a sum of money charged by will on land, as a reward for care taken of testator's daughter, who was a lunatic, and

Lord *Chancellor*, considered this as the common case of a legacy, and directed the interest on the principal sum only.

† See also 1 *Wms.* 480.—653.—1 *Vez.* 496.

*Lincoln's-Inn-Hall,**June, 8th.*

1784.

When a bill is referred for impertinence before the time for answering is out, the plaintiff cannot have an injunction as of course, but must move it on notice and affidavit.

NEALE *against* WADESON.

AN order had been obtained by the plaintiff for an injunction for want of an answer, as a motion of course. Mr. *Harvey* now moved to set aside that order for irregularity, on the ground of the bill having been referred for impertinence before the time for answering was out; and contended that referring the bill for impertinence stayed, of course, all proceedings in the cause; and he cited a case of *Harris v. Montgomery*, *Hil.* 1783, for that purpose.

Lord *Chancellor* said, that the rule was not generally, that referring the bill for impertinence stayed all proceedings: but was only this, that upon a bill's being referred before the time for answering is out, the plaintiff should not, at the expiration of the time, move for an injunction, as of course for want of an answer, but should be in the same situation as if the time for answering was not out; in which case he must move it upon notice and affidavit of circumstances. If this case, therefore, had rested on the single ground aforesaid, the plaintiff would not have obtained the injunction, without giving notice of motion; but it afterwards appeared, that the defendant's clerk in Court had taken upon himself to waive taking advantage of the irregularity, by agreeing

agreeing that the plaintiff should take an injunction as for want of an answer.

1784.

NEALE
against
WADESON.

Ex parte WEST.

In the Matter of SCAIFE a Bankrupt.

Lincoln's Inn-
Hall,
June 10th,
1784.

THIS was the petition of the bankrupt. The only question arose upon the following clause in a will: "I leave to *A. B.* and *C.* sons of *Arthur Scaife*, 1,000*l.* each, the interest to be added to the principal yearly, until they shall respectively attain the age of 21 years; and in case any of them shall die before that age, then to the survivors." *A.* died, and then *B.* both under 21 years of age. The question was whether that part of the share of *A.* which survived to *B.* upon the death of *A.* survived afterwards to *C.* upon the death of *B.* or whether *B.*'s original share only survived.

A survived
share shall
not survive
again, with-
out express
words.

Mr. *Madocks* insisted, it was an established principle in this court, that a survived share shall not again survive, without express words, or manifest intention for that purpose; and cited *Rudge v. Barker*, *Forrest* 124. and the opinions of Lord *King* and Lord *Holt* there mentioned, as fully establishing this doctrine.

Mr. *Scott*, on the other side, cited *Pain v. Benson*. 3 *Atk.* 78.

Lord *Chancellor*,—It is impossible for me to determine this survived part to survive again, without contradicting Lord *Talbot*'s decision. The question is, whether the word *share*, in the case cited, does not mean all that the party took under the will, which would take in the survived part as well as the original share, and which I should think a very natural construction; but here are cases in point expressly determined otherwise. I own it struck me forcibly from the first, that the whole ought to survive; but I cannot find any difference between this and the cases cited; and I do not care to overturn a decision fitting in bankruptcies, when I can have no opportunity of re-considering my opinion. It is very necessary that the rules of construction, in wills, should be established; and I own I cannot make out

any

1784.

Ex parte
WEST.

any distinction in this case. As to the case of *Pain v. Benson*, it seems to me that Lord *Hardwicke* disapproved of the general rule, which induced him to endeavour to find a distinction. I cannot agree with him in considering that case as an exception to the general rule, though perhaps I should in his opinion of the rule itself. However it will be too much for me to decide this, against the authorities, in a petition on a bankruptcy. If the parties chuse to bring it before me in a more solemn way, upon bill and answer, I will give it more consideration.

The parties afterwards filed a bill, and the cause was set down before his Honor the Master of the *Rolls*, who decreed that the share did not survive a second time.

June 14th.
1784.

Jewels of the wife, though given by husband's will to her for life, shall not be sold for payment of husband's debts, charged on a real estate in aid of personality.

BOYNTON *against* PARKHURST.

SIR *Griffith Boynton* having by will impowered his wife (whom he made executrix) to raise, by mortgage of a particular real estate, a sufficient sum of money for payment of his debts, in aid of his personal estate; and having devised to his wife the use of her jewels for her life. The cause coming on for further directions, a question arose, whether the wife was not intitled to the jewels absolutely, as her paraphernalia; although the personal estate was not sufficient to pay the debts, or whether they should be applied before the real estate charged with the debts, and on the authority of *Tipping v. Tipping*, 1 *Wms.* 729.

Lord *Chancellor* decreed the jewels to the wife, in prejudice of the charged estate.

Lincoln's Inn-Hall,
December
24th. 1784.
Joint creditors let in to prove against a separate estate, by consent.

Ex parte COBHAM.

A Separate commission having been taken out against *Ferryman*, who was one of three partners, the joint creditors now petitioned to be admitted to prove their debts under the separate commission.

Lord

Lord *Chancellor* said, he was aware that this point had never been decided, although it had been usual for the commissioners to refuse the proof of joint debts under separate commissions; but he did not see why the rule that applies to the case of separate creditors proving their debts under a joint commission, did not apply to this case. His only doubt was, to what extent this benefit should be allowed. It would be hard that the joint creditors should come upon the separate estate, to the prejudice of the separate creditors, and still have an exclusive power of coming upon the joint estate; but the separate assignees might, if they pleased, possess themselves of the bankrupt's proportion of the partnership effects; and then he thought the justice of the case would be, that both the joint and separate creditors should come in, *pari passu*, upon both funds. But as the present petition was consented to, he would make the order now upon consent, and leave the point, for the present, where he found it, to be decided hereafter, upon more consideration.*

1784.

Ex parte
COBHAM.* *V. Ex parte Hodgson, vol. 2. p. 5.**Ex parte* NICHOLLS.

IT having been referred to the Master to consider of a proper maintenance for the infant *Nicholls*, out of the real and personal estate of his father (who died intestate): *A. B.* came before the Master, and objected to the maintenance allowed by the Master's report, insisting that the infant was illegitimate, and that he was heir at law, and one of the next of kin of the infant's father: but he had no evidence, before the Master, in support of these facts: the Master therefore made his report of maintenance, and *A. B.* now excepted to this report upon the same grounds, which were now supported by affidavits; but

Lord *Chancellor* said, that exceptions would not lie to a report of maintenance; and moreover, that it was impossible for him to take notice, in this form, of *A. B.*'s title, which must be first established elsewhere.

Lincoln's Inn-
Hall,
December 22d,
1781.Exceptions
will not lie
to a Master's
report of
maintenance;
and a title
set up against
that of the
infant cannot
be taken no-
tice of, but
must be esta-
blished else-
where.

1784.

Ex parte BECK.

A PETITION IN PATENTS.

Same day.
A patent
bearing date
12th *August*,
but the ca-
veat not dis-
charged till
the 27th,
the patentee
supposing it
bore date
the latter
day, did not
enroll till the
18 *December*,
when the 4
months had
expired: the
date of his
patent can-
not be al-
tered.

A Caveat having been entered against putting the great seal to a patent, for an invention, which bore date 12 *August*, 1784, the Lord *Chancellor*, upon hearing the petition, took some time to consider of it; and did not make his order for discharging the caveat until the 27th *August*. The patentee did not enroll his specification until the 18th *December*, 1784, supposing the patent bore date the day the final order was made: but he was then told the four months, limited by the act of parliament for the enrollment of specifications, had elapsed.

The patentee now petitioned the Lord *Chancellor* to alter the patent, by making it bear date the 27th of *August*, instead of the 12th; but

Lord *Chancellor* said, that, although he was perfectly satisfied that the patentee was well entitled to his patent, and that his case was a very hard one; yet he could not make such an use of his power, as keeper of the great seal, as to alter a patent, in any degree, upon an application of this sort. That, perhaps, upon the petitioner's applying for a new patent, the officers might, under these circumstances, be induced to remit their fees; but that he could give no relief upon the present petition.

*Lincoln's-Inn-
Hall, Jan.
17th, 1785.*

HOARE *against* PARKER.

Bill filed to
discover ar-
ticles pawned
to defendant;
he pleads
that he lent
money with-
out notice of
plaintiff's
claim; the
plea should
aver that he
has no other
articles than

THE bill stated, that *James Stuart*, by his will dated 1st *December* 1752, gave and bequeathed to *Robert Long*, *Henry Rower*, and *Robert Greenaway*, their heirs and administrators, all his estate, both real and personal, upon the trusts therein-after mentioned; and particularly, the said testator gave and bequeathed to his wife *Mary Stuart*, for and during her life, (in case she should so long live sole and unmarried; but not otherwise,) the use and usage of such and so much of his plate, as she the those specified; and although this was sworn in the answer, that is not sufficient.

said

1785.

HOARE
against
PARKER.

faid *Mary Stuart* should think fit, chuse, and be desirous to have the use of; and the said testator thereby directed his said trustees to cause an inventory, or schedule to be made of the several particulars, whereof his said wife should make choice, and that under such inventory or schedule, they should take her acknowledgment in writing, signed by her own hand, of the receipt thereof, and of her having the same in her custody, to the end that they might be enabled, in case of her death or marriage, to recover the said plate: and the testator then proceeded to dispose of the rest of his real and personal estate, for the benefit of his son and his issue, in the manner therein mentioned, and appointed the said *Robert Long*, *Henry Rower*, and *Robert Greenaway*, executors: That after the death of the testator, his widow *Mary Stuart* made choice of some of the plate, and subscribed a receipt for the same: That *Mary Stuart* died on the 14th December 1782, by which her interest in the said plate ceased;—but that the said *Mary Stuart* in her life-time, pawned the whole or the greatest part of the said plate to the defendant, for some considerable sum of money: That the plaintiffs (who were the assignees, in trust, of the representative of the surviving trustee and executor under the will of the said testator,) had commenced an action at law, against the defendant, for the recovery of the said plate; but, that they could not proceed therein for want of a discovery of what articles of plate were pawned to the said defendant; and the bill therefore prayed that the said defendant might set forth and discover a full and particular account of all and every the several pieces and parcels of plate late belonging to the said testator, so pawned or pledged, or pretended to be pawned or pledged by the said *Mary Stuart*, or by any person or persons by her order, or for her use, with him the said defendant, together with the several days and times, when the same was or were so respectively pawned or pledged; and the respective sum and sums of money, lent and advanced, or pretended to be lent or advanced on each particular article, with true copies of all entries in his books of accounts, papers, or memorandums, original or duplicates, of such pawns or pledges, or in any wise relating thereto, in order to enable the plaintiffs to proceed to trial in the said action, to recover back from the said defendant, the said plate, so pawned or pledged or pretended to be so pawned or pledged as aforesaid.

To

1785.

HOARE
against
PARKER.

To this bill, the defendant pleaded, that on the 6th day of *April*, and 31 day of *August* 1781, &c. during all which time defendant carried on the business of a pawn-broker, the said *Mary Stuart* being possessed of certain pieces of plate, and claiming the same as, and alledging the same to be, her own absolute property, and the same so appearing to defendant, the defendant did *bonâ fide*, advance and lend to the said *Mary Stuart*, or for her use, several sums of money, (to the amount therein mentioned,) all which sums of money were really and *bonâ fide* advanced and paid by defendant to the said *Mary Stuart*, on the said days accordingly, and the said *Mary Stuart*, or her agent at the same time deposited and pledged the said pieces and parcels of plate respectively, with defendant, as a security for the said sums of money respectively; defendant then averred that the said monies never were repaid, and that he did not at any or either of the respective days, when the pieces or parcels of plate which were pledged or pawned by the said *Mary Stuart*, with him as afore-said, were pledged or pawned, or at any time before the death of the said *Mary Stuart*, know or had any notice or information, or suspicion of the will of said tfeator, &c. &c. Defendant then by answer denied notice, and said that the said *Mary Stuart*, or any other persons on her behalf, never pledged or pawned, with defendant, any plate whatsoever, except the pieces of plate mentioned in the plea; and that he had not, nor ever had had in his possession or power any other plate whatsoever in which the said *Mary Stuart* had any interest.

Mr. *Hollist*, in support of this plea insisted, that the defendant being a purchaser for a valuable consideration, without notice, was not bound to assist the plaintiff by a discovery; and cited *Snelling v. Squibbs*, 2 Ch. Ca. 47. *Perrat v. Ballard*, 2 Ch. Ca. 72. *Abny v. Williams*, 1 Vern. 27.

Mr. *Madocks* and Mr. *Stainsby*, for the plaintiffs, insisted that the rule of this Court, which says that without purchasers notice, and for valuable consideration shall not be bound to discover, only goes to a discovery of their title, and not of the particular things enquired after, being in their possession, which last is the object of the present bill; and Mr. *Stainsby* mentioned the case of *Hartop v. Hoare*, 3. Atk. 44. to shew how courts of law considered cases of this kind; it was also insisted that this plea mentioning only

some

some specific articles of plate which were pawned, and not averring that no other articles of plate were so, (though that *was* done by the answer) did not meet the point made by the bill; as it did not appear that the specific articles, mentioned in the plea, were the same as those enquired after by the bill.

1785.

HOARE
against
PARKER.

Lord *Chancellor* said that he could not see any room to make a distinction between the cases of a discovery being fought for of the title of the purchaser, and a discovery of the specific things in his possession; but the same rule must apply to both, namely, that a purchaser without notice, and for a valuable consideration is not bound, in conscience, to assist the right owner in the legal recovery of the subject purchased under such circumstances.—He therefore thought that no objection to the present plea.—But the other objection, that it was not averred by the plea that no other articles (except those specified) had been pawned to the defendant, seemed to him to be a good objection;—and it was not sufficient to aver that by an answer; which would be, in fact, making the answer supply the defects of the plea, instead of supporting it. The plea ought to have gone on to aver that defendant had no articles in his possession, but those specified before; for otherwise, it is saying that the defendant, having lent money on *certain* articles, shall be a reason why he should make no discovery as to any others: upon this objection, therefore the plea must be over-ruled.

STUART *against* WORRALL.

BILL to redeem, decree for redemption; in default of payment, at the time to be appointed by the Master, the bill to be dismissed with costs.

Report of money due, and affidavit of attendance at the time and place appointed by the report, and of non-payment.

Motion (as of course) to dismiss the bill with costs. Ordered accordingly, and said by the register to be the usual way.

February 5th,
1785.

Upon a bill to redeem a mortgage and non payment at the time appointed; it is a motion of course to dismiss the bill.

1785.

Rolls, Feb.
1st. 1785.

GILMORE *against* SEVERN.

Testator gave to the children of his sister *Jane Gilmore*, wife of *Thomas Gilmore*, 350*l.* with interest for the same, to be paid them respectively, their equal shares and proportions as they should respectively attain 21, and in case any of them should die under 21, then their shares should go to the survivors and survivor.

At the death of the testator, *Jane Gilmore* had two children, the plaintiffs; afterwards, she had another child: the plaintiffs were both infants; and the Court was of opinion, that the youngest child, being born during the infancy of the other two, though after the death of the testator, might be entitled to a share.

As none were entitled to a vested interest, the Court ordered the money to be paid into the bank.

Rolls, Feb.
3d. 1785.

SOWDEN *against* SOWDEN.

A. by marriage settlement, covenanted to pay money to trustees, to be laid out in the purchase of lands: *A.* did not pay the money, but purchased a freehold estate; decreed it to be subject to the trust.

ROBERT SOWDEN, being about to marry *Mary Row*, by settlement previous to the marriage, bearing date *September, 1779*, in consideration of 1050*l.* her marriage portion, covenanted to pay to the trustees 1,500*l.* to be laid out in the purchase of some freehold estate of inheritance in the county of *Devon*, upon trust, out of the rents and profits thereof, to pay to *Mary Row* an annuity of 15*l. per annum*, for her life, in case she survived her said intended husband; and, after the decease of both, to raise by sale 1,500*l.* or 2,000*l.* as the case might be, for the portion or portions of the child or children of the marriage, in such shares, &c. as the survivor should appoint. He also covenanted to pay to the trustees the further sum of 500*l.* to similar uses; and that, in case the lands purchased should not sell for 2,000*l.* the deficiency should be made up out of his personal estate. *Robert Sowden* did not pay the 1,500*l.* or 500*l.* to the trustees, but, soon after his marriage, purchased a freehold estate called *Pound*, for the price of 2,150*l.*

2,150*l.* and the estate was conveyed to him and his heirs; and he died without making any settlement of that estate, leaving *Mary* his widow, *Thomas* his son and heir at law, and *Mary* his daughter, who were the only children of the marriage. He died seised and possessed of other real and personal estate; the real estate descended on the eldest son, and the widow took out administration of the personal estate.

1785.

SOWDEN
again,
SOWDEN.

The daughter filed her bill against the son and widow, praying that the trusts of the settlement might be decreed to be performed, and that the estate called *Pound*, might be declared to be subject to the trusts of the settlement, or that the 2,000*l.* covenanted to be paid by her father might be raised out of his personal estate, if sufficient, or the deficiency made good out of his real estate, and the 2,000*l.* when raised, might be applied according to the trusts of the settlement.

The cause was heard on the day of *December*, 1784, and 3d. of *February*, 1785, when the following cases were cited,—*Took v. Hastings*, 2 *Vern.* 97. *Roundell v. Breams*, 2 *Vern.* 482. *Wilcox v. Wilcox*, 2 *Vern.* 558.—*Bridges v. Berc*, 2 *Eq. Abr.* 34.—*Wilks v. Wilks*, 5 *Viner*, 293.—*Letchmere v. Letchmere*, *Ca. Temp. Talb.* 80. 3 *P. Wms.* 211.—*Coffin v. Dyke*, or *Dyke v. Leeds*, 7th. *July*, 1740.—*Deacon v. Smith*, 3 *Atk.* 323.—*Attorney General v. Whorwood*, 1 *Vez.* 534.—There were also mentioned, 5 *Brown's Parlt. Ca.* 552.—*Edwards v. Freeman*, 2 *Wms.* 435.—665.—*Lewis v. Hill*, 1 *Vezey* 274.

Some parol-evidence was offered to shew the intention of *Robert Sowden* in purchasing the estate was to perform his covenant, and it was read, but it was very slight.

His Honor was of opinion, the evidence ought not to be admitted. He thought *Letchmere v. Letchmere*, decided the case. He conceived the principle established to be that, "where a man is bound to do an act, and he does what may enable him to do the act, it shall be taken to have been done by him with the view of doing that which he was bound to do."

He therefore was of opinion, that the *Pound* estate was to be considered as purchased by *Sowden*, with a view to perform the covenants in the settlement, and therefore was bound in equity to the performance of them; and decreed accordingly.

JAMES

1785.

JAMES HIGHWAY, ELIZABETH BRADLEY, Widow, Relict and Executrix of the last Will and Testament of THOMAS BRADLEY, deceased; THOMAS BRADLEY and ELIZABETH BRADLEY, Infants, by the said ELIZABETH their Mother, and next Friend (the only Children of the said ELIZABETH BRADLEY, Widow, by the said THOMAS BRADLEY, deceased) JOHN WELCH, and MARY his Wife, THOMAS PHILPOTT, and JOHN CORBETT, Assignees of JAMES WATTS ROMNEY, under a Commission of Bankrupt,
Plaintiffs.

WILLIAM JOHN BANNER, DANIEL WINWOOD, WILLIAM PHILLIPS, and ANN his Wife, JAMES BALL, JOHN HIGHWAY, JAMES WATTS ROMNEY, and DOROTHY his Wife,
Defendants.

*Rolls, 25th
April, 1785.*

Settlement on marriage, to the husband for life, remainder to wife for life, remainders to the heirs of their bodies, a strict settlement, but not so where the power of barring the entail is given to both.

FRANCIS HIGHWAY, in 1739, held certain estates of the manor of *Chadgley*, alias *Chaddefley Corbett*, by copy of court roll, *sibi et suis*, but not at the will of the lord; the words *sibi et suis* are considered as giving an inheritance. By the custom of the manor, the copyhold lands descend upon the eldest son of the tenant, according to the rule of the common law; but on failure of sons, the lands descend upon the eldest daughter alone, as customary heir.

Francis Highway, by articles of agreement dated the 24th of June, 1734, and made previous to his marriage with *Dorothy Cave*, between *Francis Highway*, of the one part, and *Mary Cave*, widow, and *Dorothy Cave*, her daughter of the other part, in consideration of the intended marriage, and of 1,000*l.* to be paid by *Mary Cave* as a portion with *Dorothy*, covenanted with *Mary Cave*, at any time after the marriage, at the request of *Mary Cave*, to surrender his copyhold lands to the use of himself for life, remainder to his intended wife *Dorothy Cave* for life, in lieu of dower; and from and after the deceases of *Francis* and *Dorothy*, to the use of the heirs of her body by him, if he

he survived her; but if she survived him, to the heirs of his body on her body to begotten, remainder to his own right heirs; and after taking notice, that, by the custom of the manor, *Dorothy* would be intitled to the land for life, for her free bench, if she survived him, unless he should do some act to prevent it: He further covenanted with *Mary Cave*, her executors, administrators, and assigns, that he had not done, and would not thereafter do any act to prevent *Dorothy* from holding or enjoying the premises, during her life, for her free bench, or to prevent the same descending to the heirs of his body by her, immediately after her death, or do any act to charge, mortgage, or incumber the said estate, or any part thereof; and likewise covenanted, that in case *Dorothy* should die before him, and before such surrender should be made as aforesaid, leaving issue, that he would, within three months after her death, surrender the said premises, free from incumbrances to the use of himself for life, and after his death to the use of the heirs of the body of *Dorothy* by him, with remainder to his right heirs.

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HIGHWAY
again?
BANNER.

Francis Highway and *Dorothy Cave* afterwards married, and had issue several sons and daughters; the eldest of which sons, *Thomas*, married without his father and mother's consent, whereby he disobliged them.

On the 8th of *April*, 1760, *Francis Highway* surrendered the estates to the uses mentioned in the marriage articles, and *Francis* was admitted accordingly; and, at the same court, he and *Dorothy* his wife surrendered the estates to the use of *Francis* and *Dorothy* for their joint lives, and the life of the survivor, and after their deaths to the use of *Thomas*, their eldest son, for life, and after his death to the first son of *Thomas*, who should live to attain 21, and the heirs of such first son for ever; and for want of such issue male of *Thomas* who should live to attain 21, to the use of such person or persons, and for such estate and estates, and in such manner as the said *Francis Highway* should by deed or will appoint.

Francis, by his will dated 16th *September*, 1772, after taking notice of the above surrender, devised the whole of the copyhold estates (except a dwelling-house, with its appurtenances) to his son *Thomas Highway*, and his heirs, subject to the payment of

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against
BANNER.

1,200*l.* for the benefit of some of his younger children, and other issue, to be paid at the end of six months after the decease of the survivor of *Francis Highway* and *Dorothy* his wife, in the manner and proportions mentioned in the will. *Francis Highway* died 21st *December*, 1772. On his death, his widow entred, and was admitted tenant, and enjoyed for her life, and *Thomas Highway* was admitted tenant, subject to the estate for life of his mother, and surrendered to the use of his will; and, by his will, devised the estates to the defendants *Banner* and *Winwood*, and their heirs, upon certain trusts. *Thomas* afterwards died without issue.

On the death of *Thomas*, *John* his brother, as having an equitable estate tail under the marriage articles of his father and mother *Francis Highway* and *Dorothy* his wife, or under the first mentioned surrender, claimed the estates, and afterwards sold his interest therein to *Phillips*, who married the widow of *Thomas* and residuary devisee in his will; and *John Highway* was admitted tenant, and surrendered to *Banner* and *Winwood*, the trustees, upon the trusts in his brother *Thomas Highway*'s will.

The bill was filed (among other things) to have the 1,200*l.* raised. Several questions were made in the cause; 1st. Whether the surrender, in 1786, to the uses mentioned in the articles, was a due execution of the articles; and whether, by the subsequent surrender, *Francis Highway* gained an absolute power over the estate. 2dly. Whether if *Francis Highway* had not a power to dispose of the estate; and whether *Thomas*, who was intitled to other property under his father's will, was not bound to make an election to abide by the will, or make a satisfaction for the 1,200*l.* out of the other property devised to him; and whether he had not actually made his election, and barred the entail by the surrender to the use of his will; estates tail being barrable by surrender, according to the custom. And 3dly. If the estate tail was not barred by the surrender of *Francis* and *Dorothy*, or by the surrender of *Thomas* (which last surrender, being in the life-time of *Dorothy*, who was tenant for life, his Honor was of opinion would not operate to bar the entail); whether *John*, who also took benefits under his father's will, was not also bound to make an election.

His

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whether the doctrine of election applied to copyholds; but that had been decided by the Court of *Exchequer*, in *Standish v. Standish* *. On the first point, he declared his opinion that the articles were properly carried into execution by the first surrender in 1768; and that the second surrender let in the disposition made by *Francis Highway's* will; and he decreed that the 1,200*l.* should be raised out of the estate, according to the will, and gave the directions necessary for that purpose.

* *Frank v. Standish, Exchequer, 19th December, 1772.* A testatrix being seised of freehold estates, and some copyhold lands, lying dispersedly, and having surrendered her copyhold estates to the use of her will, by her will devised all her real estates, as well freehold as copyhold, and gave Lady *Standish*, who was one of her co-heirs at law, 1,000*l.* After the making of her will, she exchanged those copyhold lands for others: which were surrendered to her, and did not surrender those to the use of her will. The cause had been heard a few days before, when the question was made, whether Lady *Standish* should be put to her election; and the Court this day gave judgment unanimously, that this case was within the reasoning of *Noys v. Mordaunt, 2 Vern. 581.* and Lady *Standish* having elected to take the 1,000*l.* legacy, decreed that she and the other co-heirs should surrender the copyhold to the uses of the will.

Mar., 7th,
1785.ROBINSON *against* Lord BYRON.

Injunction to
restrain de-
fendant from
preventing
water flow-
ing in regu-
lar quantities
to a mill.

MOTION for an injunction to restrain Lord *Byron* from preventing the water flowing to a mill which the plaintiffs used for a cotton manufacture, or letting a greater quantity of water than usual flow upon the mill.

The motion was before appearance, upon affidavits which stated that, since the 4th of *April*, Lord *Byron*, who had large pieces of water in his park, supplied by the stream which flowed to the mill, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill; and the affidavits contained strong expressions of Lord *Byron's* shewing that his object, in these proceedings, was to obtain money from the plaintiffs.

Lord *Chancellor*.—The Court will not restrain what has been enjoyed for 20 years past; but if what has been so enjoyed is used in a different way, so as to do mischief, the Court may interpose.—His Lordship accordingly ordered an injunction to
restrain

restrain Lord *Byron* from using dams, wears, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of *April*, 1785.

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BYRON.

Afterwards his Lordship altered the terms of the order, and added the words, "so as to prevent the water flowing to the mill, in such regular quantities as it had ordinarily done before the 4th of *April*."

When the answer came in, it was insisted before the Master of the *Rolls*, sitting for Lord *Chancellor*, that the affidavits could not be read; but he was of a contrary opinion.*

* *V. post. vol. 2. 90.*

PITT against BENYON.

THE testator directed the interest of a sum of pagodas, to be paid to *A. B.* during her life; and after her death he gave the pagodas to his residuary legatees after-named. He then gave the residue of his estate to *Pitt* and *Benyon* as tenants in common.

Pitt died, *Benyon* survived, and died, plaintiff was representative of *Pitt*, defendant of *Benyon*, *A. B.* died.

It was insisted for the defendant, that the interest of *Pitt* and *Benyon* in the pagodas was a joint-tenancy.

Lord *Chancellor* was of opinion, it was part of the residue; and that the residuary legatees were tenants in common of this, as well as of the other parts of the residue.*

* See *Perkins v. Baynton*, ante, p. 118.

May 7th,
1785.

Gift of a particular fund for life, then to residuary legatees as such; then the residue given to them as tenants in common: the particular fund is part of the residue.

1785.

*Trin. Term,
June, 7th,
1785.*

Some of the
executors
having unequal, and others no legacies, shall take the residue.

OLIVER *against* FREWEN.

THIS was a bill filed by the next of kin, against the defendants the executors and other parties, for an account of the residue, &c.

The question was, whether the executors, some of whom had *unequal legacies*, and others none, or the next of kin should take the residue. There was a clause in the will, directing that, in case any legatees should die in the life-time of the testator, their legacies should go to the executors. *Lawson v. Lawson*, 7 Bro. Parlt. Ca. 511, and other cases cited in the case of *Bowker v. Hunter*, ante p. 328. were recognized in the present case, but, after a short argument the Chancellor dismissed this bill; being of opinion that the plaintiff had no right to a share of the residue, but that the same belonged to the executors.

A TABLE

A T A B L E O F P R I N C I P A L M A T T E R S.

The matters marked with an asterisk occur in the Appendix; those with a dagger preceding, in the additional notes to this edition: where the dagger follows the letter n (n†) the note in the former edition is considerably enlarged in the present.

A.

ACCOUNT.

MONEY belonging to wards of the court cannot be transferred to the Accountant General, to the credit of the cause, until the account is taken before the Master, (*Bencraft v. Rich*) Page 56

† ADEMPTION.

Removal of goods (except in a case of necessity) will be an ademption of a gift of the goods by will, (*Green v. Symonds*) 129 n

AGREEMENT.

See BILL for SPECIFIC PERFORMANCE.

ALLOWANCE.

A special direction to the Master, in settling an allowance to an eldest son, to consider the birth of a posthumous child, refused (*Burnet v. Burnet*) 179

See MAINTENANCE.

For BANKRUPT'S ALLOWANCE. See BANKRUPT.

ANNUITY.

An annuity given to testator's wife, for life, and then, after certain interests, to remain to the testator's eldest son, and the heirs male of his body, remainder to his (testator's) next eldest son, and his heirs male; the eldest and two other sons died, living the wife:—This is not personal estate vesting absolutely in the eldest son, nor does it vest in the fourth son, as an executory devise, but, the annuity being exhausted, sinks into the residuary estate of the testator (*Turner v. Turner*) Page 316

An annuity charged upon the Post-office, until a sum should be paid to be laid out in land, is a mere personal annuity, and passes by grant or transfer (*Holdernesse v. Carmarthen*) 377

A gift, by will, of stock in long annuities, *primâ facie*, means so much a year (*Stafford v. Horton*) 482

But evidence shall be let in of the state of the testatrix's property, to shew she could only mean a gross sum to that amount (*Fonnerau v. Poyntz*) 472

ANSWER.

Upon motion for time to answer, the defendant puts in a plea; it is a sufficient compliance with the order (*Roberts v. Hartley*) 56
An

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An answer only denying combination, is not a compliance with an order for time to plead, answer, or demur, but not to demur alone (*Lee v. Pascoe*) Page 78

An answer shall not be amended after an indictment for perjury preferred or threatened, in order to avoid the indictment (*Verney v. Macnamara*) 419

*When sums are specifically charged in the bill to have been received by the defendant, he must answer specifically; and it is not enough to refer to a schedule (*Hepburn v. Durand*) 503

See ASSETS—EVIDENCE.

A P P E A L.

An appeal shall not be for costs only (*Wirdman v. Kent*) 140

A P P O I N T M E N T.

See POWER.—TERMS for YEARS.

*Apportionment.
See Lease.*

A S S E T S.

Testator directed that all his estates should be sold, and, after payment of certain sums, the remainder to be vested in his executors for the payment of debts: the money arising from the sale, held to be equitable assets (*Newton v. Bennet*) 135

Devise to executors to sell and apply the money to payment of debts, the assets are equitable (*Silk v. Prime*) 139 nt

An admission of assets, by the executor's answer, is waved, if the plaintiff goes to an account before the Master (*Wall v. Bushby*) 484

*Assets shall not be made
—shall except for interest debt. 205.*

See REVERSION.

B.

B A N K O F E N G L A N D.

*The question being whether the plaintiff has a lien upon stock; the Court will not order the Bank to permit a transfer (*Birch v. Corbyn*) 571

B A N K R U P T.

A conveyance of all a man's goods as a security, (he being at the time solvent) was thought by the Lord Chancellor, no act of bankruptcy, and the jury having found the party a bankrupt, a new trial was awarded: but upon a second trial, a case reserved, and argument in *B. R.* it was held to be an act of bankruptcy (*Haffel v. Simpson*) Page 99

A. in order to renew a lease, borrowed half of the fine of a trader, and gave a note to repay it, unless, by will, she should give the estate to one of his children: She, by will, gave it to his daughter; the father became bankrupt: the assignees held to be entitled under 1 *Ja. 1. c. 15* (*Fryer v. Flood*) 160

A farmer taking the soil off the waste to make bricks, and afterwards paying a consideration for it, is a trader within the bankrupt laws (*Ex parte Harrison*) 173

So of renting brick ground only, independent of the farm (*Parker v. Wills*) ibid. nt

Annuity creditors not allowed to prove their debts, but upon the consent of the other creditors at a special meeting (*Ex parte Cator*) 267

Not unless the bonds were forfeited at law (*Ex parte Burrow*) 268

A. having made an insurance for the benefit of B.'s testator, pledged the policy with the broker for his own debt: This is not a fraudulent leaving of the policy in A.'s hands by B.'s testator (*Falkener v. Case*) 125

Pledge of a lease by a person who afterwards becomes bankrupt, carried into execution against the assignees (*Ruffel v. Ruffel*) 269 & nt

Evidence of a bankrupt who had his certificate and allowance admitted to decrease the fund (*ibid.*) 269

Where a party has clear separate demands on a bankrupt, he may sue for one, and come under the commission for the other; but not if they are only different securities for the same debt (*Ex parte Crinsoz*) 270

An assignee keeping money unnecessarily in his hands, and using it in his trade, shall pay interest for it (*Treves v. Townshend*) 384

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Father, being seised of an estate for life, remainder to the son in fee, they join in a mortgage; the father becomes bankrupt, and the mortgagee files his bill of foreclosure, and the estate is ordered to be sold: the son cannot prove the value of his remainder as a debt under the commission (*Kittear v. Raynes*) Page 384

Sums secured under a marriage settlement, are proveable under a commission of bankrupt, so far as they are certain (*Ex parte Mitford*) 398

Debts upon the insurance of ships are only proveable against the separate estate of the partner who signs the policy; the insurance by a partnership being against the 6 Geo. 1. c. 18. (*Ex parte Angerstein, and Ex parte Lee*) 399, 400

The bankrupt's allowance shall, in the case of partners, be divided between them in the proportions in which their respective effects have contributed to the payment of the debts (*Ex parte Bate*) 452

* Joint creditors admitted to prove against the separate estate by consent (*Cobham Ex parte*) 576

Joint creditors admitted to prove their debts on the separate estate of one partner, there being no joint estate (*Ex parte Hayden*) 454

See PLEDGE.

B A R G A I N.

Unreasonable bargains made with an heir, &c. although more than of age, and upon his own offer, set aside, on what circumstances and upon what terms (*Gwynne v. Heaton*) 1

Deeds entered into by parties knowing their rights are not to be set aside, though upon inadequate consideration (*Stephens v. Bateman*) 22

A fair settlement, beneficial to the family, was not set aside, although made with tenant in tail, immediately upon his coming into possession, and at the recommendation of the father who took an interest under the settlement (*Kinchant v. Kinchant*) 369

* Taking an annuity worth 9 years purchase at 5 years, is an unconscientious bargain, and the Court will give the taker no af-

sistance in a bargain for a re-purchase (*Vaughan v. Thomas*) Page 556

* Leases for lives, obtained by agents of a deceased person of weak intellects, upon inadequate considerations, set aside. (*Gartside v. Isherwood*) 558

B A R O N and F E M E.

The wife's bond, given jointly with her husband, shall bind her separate property (*Hulme v. Tenant*) 16

What interests of the wife so vest in the husband as to vest in his assignees upon a bankruptcy (*Saddington v. Kinsman*) 44

* Where trustees are interposed, the Court will not authorise a married woman's parting with her life-interest in a sum of money upon examination; in analogy to an examination on a fine at law (*Frazer v. Bailey*) 518

* Jewels of the wife, though given by the husband's will to her for life, shall not be sold for payment of the husband's debts, charged on a real estate in aid of personalty (*Boynston v. Parkhurst*) 576

B I L L

Will not lie against several for a mere legal demand, on account of the death or bankruptcy of some of the parties (*Hoare v. Contentin*) 27

Bill by a tutor for an annuity, claiming it as a debt under a devise for payment of debts by bond, mortgage or simple contract, the only evidence being letters referring to an annuity, but not stating its duration, dismissed (*Jameson v. Skipwith*) 34

Bill will not lie for one parish against another, to ascertain boundaries (*St. Luke's Parish v. St. Leonard's*) 40

Bill will not lie to compel an hospital to renew a lease upon payment of a fine of one year's rent (*Somervill v. Chapman*) 61

Will lie for a discovery of matter to constitute a defence to an action at law (*Bishop of London v. Fytche*) 96

Will not lie against several tenants of a manor for quit-rents, unless the premises are untenanted (*Bouverie v. Prentice*) 200

Can not be dismissed without costs on the plaintiff's motion, unless by consent at the bar (*Fidele v. Evans*) 267

7 R

The

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The process directed by the 5 G. 2. c. 25. in order to the bill being taken *pro confesso*, shall issue notwithstanding a *subpoena* has been served (*Mawer v. Mawer*) Page 388

BILL for specific Performance of Agreements.

A. sells an estate for an annuity. A. dies before any payment of the annuity; if the contract be fair it shall be specifically performed (*Mortimer v. Capper*) 156

In such bill against the vendor, the vendee or his heir being in possession, (the agreement having been made by the tenant for life, with the reversioner,) and an account of the purchaser's personal estate becoming necessary, an early day shall be appointed for payment of the purchase money, and in failure, the bill *quoad hoc* to be dismissed (*Lowther v. Andover*) 396

Bill for specific performance of an agreement to purchase, dismissed, there being a concealment on the part of the vendor (*Shirley v. Stratton*) 440

* That the vendee bought on a speculation (if that was not consented to by the vendor) no defence to a bill for specific performance (*Adams v. Weare*) 567

BILL of Revivor.

Bill of revivor will lie for costs ordered to be paid into the bank (*Hall v. Smith*) 438

BILL Parties.

In a bill against the committee of a voluntary society who contract with a tradesman, it is not necessary to make the other members of the society parties (*Cullen v. Queensberry*) 101

So of the commissioners of a navigation who have signed any of the orders (*Horsley v. Bell*) *Ibid.* n.

In a bill by creditors against the executor, it is not necessary to make the residuary legatee a party (*Lawson v. Barker*) 303

Where there are three mortgagees, being joint tenants, one cannot bring a bill to foreclose without making the other parties (*Lowe v. Morgan*) 368

BOND.

A bond, being at the testator's house in *Suffolk*, does not pass by the words in his will, "I give all in *Suffolk*," the bond having no locality (*Moore v. Moore*) Page 127

† Securities for money do not pass by goods in testator's study (*Green v. Symonds*) 129 n.

A bond given for filks taken up to be sold, decreed to be given up on the payment of the money actually raised by the sale of the filks (*Barker v. Vansommer*) 149

A bond given for a general purpose of raising money, and deposited by the obligee with another as a security, shall be liable to the obligee's debt: not so if given for a special purpose (*Cator v. Burke*) 434

C.

CABINET.

By the bequest of a cabinet of curiosities, jewels worn as ornaments of the person do not pass, although they were usually shewn as part of it (*Cavendish v. Cavendish*) 467

CHARGE

On a real estate for a charity (void by the *Mortmain Act*) shall sink in favour of the devisee, not go to heir at law or residuary legatee (*Wright v. Row*) 61

† S. P. (*Jackson v. Hurluck*) 61. n.

† *Sed vide* (*Bland v. Wilkins*) *Ibid.*

When a tenant for life pays off a charge (although he take no assignment) he becomes a creditor for the amount of it; but where tenant in tail pays off a charge, he does it in exoneration of the estate, unless he shews his intention to be otherwise (*Jones v. Morgan*). 206

A charge of legacies under a *viz.* then a legacy out of the personal estate, then other legacies without any fund named, these last are not charged on the real estate (*Hone v. Medcraft*) 261

Under a general charge, copyhold is liable as well as freehold (*Coombs v. Gibson*) 273

† Of

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† Of debts and legacies on land, the purchaser is not obliged to see to the application (*Jeffer v. Abbot*) Page 186. n.

See MORTGAGE.

See DEVISE for PAYMENT of DEBTS.

CHARITY.

Trustees of a charity are ordered to be elected out of a certain parish; an information to remove them, as not having been so elected, must state that there were inhabitants fit to be elected (*Attorney General v. Cowper*) 439

See MORTMAIN.

CHATTELS.

Chattels given as heir looms, to be enjoyed by the persons who shall be in possession of certain houses, a son being born who was tenant in tail, subject to his father's life estate, these chattels will vest in him absolutely, and he dying, in his father as his representative (*Foley v. Burnell*) 274

CODICIL.

There being several codicils to a will some of which were bare repetitions of former ones, these were declared to be mere substitutions, and the legatee entitled only to take under the one (*Campbell v. Radnor*) 271
Where a legacy is given in a will and another in the codicil to the same legatee, he shall take both (*Ridges v. Morrison*) 389
S. P. (*Hooley v. Hatton*) 390, n.
† A codicil referring to a will operates as a republication (*Coppin v. Fernyhough*) 265. n.

COMMISSION.

Application for a commission to examine witnesses in *India*, to prove the testator's intention that his wife should take legacies given her by two codicils almost identical in their expressions, refused, except upon her oath, that she believed such to be the testator's intention (*Coote v. Coote*) 448

CONDITION.

Devise, if *A.* or *B.* shall marry into the families of *C.* or *D.* and have a son, then I give my estate to that son; if they shall not marry, then to *E.* *A.* and *B.* married, but not into the favoured families, the marriage is a condition precedent which they have their whole lives to perform, and *E.* has no claim till after their deaths (*Randall v. Payne*) Page 55

See MARRIAGE.

CONSIDERATION.

Inadequate consideration a badge of fraud (*Gynne v. Heaton*) I
* S. P. (*Gartside v. Isherwood*) 558

COPYHOLD.

Under a general charge of debts upon land, copyhold is liable as well as freehold (*Coombe v. Gibson*) 273
* Enfranchisement of a copyhold, by one having a partial interest, is for the benefit of the remainder-men as well as his own (*Wynn v. Cookes*) 517
* The doctrine of election applies to a copyhold (*Frank v. Standish*) 588. n.

COSTS.

On an assignment of dower, by commissioners, the dowerers shall have no costs, unless other questions are raised in which the party is litigious (*Lucas v. Calcraft*) 134
There shall not be a re-hearing or appeal for costs only, unless on very special circumstances (*Wirdman v. Kent*) 140
But there may be a bill of revivor for costs ordered to be paid into the bank (*Hall v. Smith*) 438
In a cause set down upon bill and answer, the court may give full costs (*Mansell v. Bowles*) 403
When the material issue has been found for the party setting down the cause for further directions, he shall have the costs of the trial at law (*Blackburne v. Gregson*) 420

COVE-

A TABLE OF PRINCIPAL MATTERS.

COVENANT

To settle a particular estate, the breach is matter of damage, and an issue shall be granted to try what the damage is (*Wade v. Paget*) Page 363

* One covenants to pay money to trustees to be laid out in real estate; he does not pay it, but purchases an estate, it is subject to the uses (*Sowden v. Sowden*) 582

DAMAGES

Received or assessed for a breach of covenant in not settling a certain estate; if the party would have been seised of the estate in fee, the damages are part of his personal estate; but if subject to contingencies they shall be laid out in land (*Wade v. Paget*) 363

DEBTS,

See CHARGE.

DEEDS,

Entered into by parties knowing their rights, though upon inadequate consideration, shall not be set aside (*Stephens v. Bateman*) 22

Deposited as a pledge will entitle the holder to have a mortgage (*Russel v. Russel*) 270

† See also the cases *Ibid.* n.

DEMURRER

Upon an order to plead, answer, or demur, but not to demur alone, the defendant demurred, and answered only by denying combination, the demurrer was ordered to be taken off the file (*Lee v. Pascoe*) 78

Upon a *quare impedit* brought against the ordinary, he files a bill for a discovery whether there were not a bond of resignation given, in order to plead it to the action; the defendant demurred, 1st. that the discovery would subject him to penalties; 2d. that it was immaterial. To the 1st. it was answered that the bonds were legal, to the 2d. that the plaintiff had a right to the discovery, and its materiality is to be debated

elsewhere: and the demurrer was over-ruled (*Bishop of London v. Fytch*) Page 96

Allowed to a bill for a conveyance, the estates being legal, not equitable ones (*Thong v. Bedford*) 313

To a bill against the East India Company and their Secretary, to discover by what authority plaintiff was dispossessed of a lease for supplying Madras with tobacco, and for a commission to examine witnesses in India; stating that the plaintiff intended to bring an action, over-ruled (*Moodalay v. East India Company and Morton*) 469

* Bill to be quieted in the possession of a mill; and that defendants may pull down works above it and be restrained from erecting others: demurrer, because plaintiff had not established his right at law, allowed (*Weller v. Smeaton*) 572

DEPOSIT,

See DEEDS.

DEPOSITIONS

Of a witness re examined before a master, on the same matter to which he had been examined in chief, without order, suppressed (*Sawyer v. Bowyer*) 388

DEVISE

To trustees (after deducting taxes, &c.) to pay the residue to *A.* for life, remainder to the use of the heirs male of *A.* these two estates do not unite so as to enable *A.* to suffer a recovery (*Shapland v. Smith*) 75

Of leasehold ground rents arising from an under building lease, passes the leasehold reversion (*Kaye v. Laxon*) 76

Testator having freehold and leasehold tythes, (the latter perpetually renewable) gave all his tythes; both kinds will pass (*Turner v. Huffer.*) 78

Devise to a corporation in trust, the devise being void, the trust shall attach upon the estate the law raises (*Sonley v. the Clock-Makers Company*) 81

A. conveyed estates to trustees to sell and pay debts, afterwards to raise a fund and pay the interest of it to *B.* till marriage, then to pay

A TABLE OF PRINCIPAL MATTERS.

pay her the principal, and to divide the residue among the plaintiffs: by will he created a charge for another daughter; residue to plaintiffs: *B.* dying unmarried, the sum given to her resulted to the testator, and passed by the gift of the residue (*Hewit v. Wright*) Page 86

To *A.* for life; remainder to her sons in tail; remainder to her daughters, as *tenants in common*: The question, whether the daughters took estates for life only, or of inheritance, agitated but not determined (*Tweeddale v. Coventry*) 240

Of leasehold estate held under a college; after the will made, the lease is renewed: The renewed lease does not pass (*Hone v. Medcraft*) - 261

To wife for life; remainder to trustees to preserve contingent remainders; remainder to *A.* for life; remainder to trustees; remainder to the heirs of her body; remainder over, with a declaration, that she should only have an estate for life:—These are legal estates (*Thong v. Bedford*) 313

Testator devised in these terms, "all I am worth:" real, as well as personal estate, shall pass (*Huxtep v. Brooman*) - 437

Words of *desire or request*, in order to amount to a devise, must have precise objects (*Harland v. Trigg*) 142

Devise to testator's wife, "not doubting she will give what shall be left to my grandchildren;" not sufficient to raise a trust. (*Wynne v. Hawkins*) 179

Testator devised all his estate to his wife; in case of death happening to her, he desired his executors to take care of the whole for his daughter: The wife shall take only an estate for life, with remainder in fee to the daughter (*Nowlan v. Nelligan*) 489

*To all the children of *A.* at 21, a child born after the death of the testatrix shall take (*Congreve v. Congreve*) 530

DEVISE *executory.*

Devise to *A.* for ever, that is if he shall have a son or sons, who shall attain twenty-one, but if *A.* shall die, without son or sons to inherit, that the son of *B.* shall inherit: This is a fee in *A.* with an execu-

tory devise to the son of *B.* (*Heath v. Heath*) Page 147

Devise of the residue of personalty to testator's wife for life; and, if she shall die without issue living at her death, to the testator's two brothers; or if one of them shall be dead, to the survivor: they both died, living the wife, who died not leaving issue, it vested in the surviving brother, and was transmissible to his representative (*Barnes v. Allen*) 181

DEVISE *over, too remote.*

Devise to *A.* and the lawful heirs of his body, if he shall have any; if he shall die without, certain sums over: This is too remote (*Attorney General v. Hird*) 170

To testator's wife and her heirs, but, in case of her decease without issue, to the eldest son of his brother—Too remote (*Bigge v. Bensley*) 187

DEVISE *for Payment of Debts.*

Devise of an estate for payment of debts takes it out of the statute of fraudulent devises:—And being to pay out of rents and profits, no sale or mortgage can be made (*Lingard v. Derby*) 311

†See the note *ibid.*

A mere charge, upon the real estate, to pay debts and legacies is not sufficient to exonerate the personal estate, unless there are words to shew it was the testator's intention that the personalty should not be applied (*Samwell v. Wake*) 144

Devise of real and personal estate to pay debts and legacies, the personal estate shall not pay the ancestor's mortgage or a legacy charged on land (*Lawson v. Hudson*) 58

Neither shall such charge make a term for payment of debts liable to a mortgage which subsisted on an estate at the time when the testator purchased it, but the mortgaged estate shall bear its own burthen (*Ancafter v. Maier*) 454

Sir *R. W.* reciting himself to be seised, subject to incumbrances, of an estate which was mortgaged, devised another estate for a term of twenty-one years, in aid of his personal estate, to pay *bond and book debts,*

7 S

and,

A TABLE OF PRINCIPAL MATTERS.

- and, by a subsequent clause, to pay *all his* debts, the personal estate and the term, shall exonerate the mortgaged estate (*Tweeddale v. Coventry*) Page 240
- Devise to pay debts by bond, mortgage, or simple contract, shall not pay an annuity only promised by letters (*Jameson and Skipwith*) 34
- Under a general charge for payment of debts, copyhold estate is liable as well as freehold estate (*Coombes v. Gibson*) 273
- *An estate descended shall exonerate an estate charged with payment of debts (*Davies v. Topp*) 524
- See CHARGE, LEGACY, MORTMAIN, VESTED INTERESTS.

D O W E R.

- Costs shall not be given on an assignment of dower by commissioners (*Lucas v. Calcraft*) 134
- Devise of a rent-charge is not a bar of dower, unless so expressed, or the estate so small as to shew it must have been so intended (*Pearson v. Pearson*) - 292
- †But where the gift is inconsistent with dower, it shall be a satisfaction for it (*Villa Real v. Lord Galway*) - 292 n
- A wife shall not be endowed of an equity of redemption on a mortgage in fee (*Dixon v. Saville*) - 326
- A thousand pounds a-year was given to the wife, by will, in lieu of dower, but if she marry again 100*l.* a-year in lieu of all other benefits; she marries and elects her dower, she shall not have the 100*l.* a-year (*Boynton v. Boynton*) - 445

E.

E L E C T I O N.

- The wife being entitled to an estate under the marriage-settlement, the husband, by will, gave her an interest in another estate and all his personalty, in lieu of her claims; the will was not duly executed to pass real estate: she must elect between the personal estate and her dower;—but is entitled

to delay her election until the account of the personal estate is taken (*Newman v. Newman*) Page 186

Where a certain sum is settled by marriage-articles upon the only child of the marriage; the father afterwards, by will, gives her all his real estates for life, with remainder to her children; and orders his personalty to be laid out in lands to the same uses;—also copyholds (of which he had only the equity of redemption) are surrendered; she must elect between the devises under the will, and the sum which she claims under the settlement (*Macnamara v. Jones*) 481

The testator devised estates, which he had surrendered in several parishes (describing them) to his wife for life, with remainders over. In one of the parishes named, he had a joint estate with his wife; in the others, he had no estates but in her right; the estates of the wife, not passing by the surrenders, do not by the will, and she shall not be put to any election (*Read v. Crop*) 492

†The doctrine of election applies to copyholds (*Frank v. Standish*) 588 n.

See DOWER, FORFEITURE, SATISFACTION.

E Q U I T Y.

- Where matter is originally of legal jurisdiction, the death or bankruptcy of parties (though it might lead to an account) will not support a bill filed before the events happen (*Hoare v. Contencin*) 27
- Where an equitable estate, and a legal in the same premises vest in the same person, the equitable interest will merge in the legal (*Wade v. Paget*) 363
- Equitable securities (the legal estate being in a prior mortgagee) shall take their rank according to the priority of their dates (*Becket v. Cordley*) 353

E S T A T E.

- Devise to trustees (after payment of taxes, &c.) to pay the residue of rents and profits to C. S. for life, remainder to the wife of the heirs-

A TABLE OF PRINCIPAL MATTERS.

heirs-male of the body of C. S.—C. S. has only an estate for life, not an estate-tail (*Shapland v. Smith*) Page 75

See also the note ib. n. t.

An equitable estate-tail may be barred by a recovery, as well as a legal estate-tail (*Boteler v. Allington*) 72

The testator devised to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste, after his decease to the use of the heirs-male of his body, severally, successively, and in remainder.—This is an estate-tail in A. (*Jones v. Morgan*) 206

*Testator devised to his heir at law for life, remainder to R. C. for life, and to his first and other sons, remainder to R. S. and W. M. for their joint lives, and to the survivor of them—the survivor only takes an estate for life (*Ause v. Melhuish*) 519.

See REAL and PERSONAL ESTATE.

ESTOVERS

Of one estate are not to be applied to the repairs, &c. of another estate (*Lee v. Alston*) 194

EVIDENCE

Of one witness, corroborated by circumstances, admissible against the facts sworn in the defendant's answer, and sufficient to found a decree (*Pember v. Mathers*) 52

A witness had been examined *de bene esse*, and lived eighteen months after the answers; the depositions had been published, the defendants consenting; his Honor refused to suppress the depositions, but Lord Chancellor inclined to think they ought not to be read (*Maybank v. Brooks*) 84

The evidence of a bankrupt having had his certificate and allowance, admitted to be read (*Ruffel v. Ruffel*) 269

EVIDENCE-parol.

Parol evidence to prove that the testator knew a legatee was dead, in order to shew his intention that the legacy should be transmissible, not admitted (*Maybank v. Brooks*) 84

Upon a grant of an annuity, a bill was filed to redeem, upon a suggestion that it was part of the original agreement, but omitted in the deed, from an apprehension that it would make the transaction usurious: parol-evidence was offered to prove it was part of the original agreement; but refused to be admitted; the bill not stating the omission to have been by fraud (*Irnham v. Child*) Page 92

Parol-evidence of an agent admitted to prove a party to a deed had notice of an incumbrance on the estate (*Shelburne v. Inchi-quin*) 338

Evidence of the state of a testatrix's property let in to shew that by a gift of a sum in long annuities, she meant a gross sum, not an equivalent annuity (*Fonnereau v. Poyntz*) 472

EXCEPTIONS

To the answer to an amended bill, referred to the same Master to whom the exceptions to the original bill had been referred (*Pratt v. Taffier*) 39
See MAINTENANCE.

EXECUTORS

Having legacies given to them, and there being no next of kin to take the undivided surplus, are trustees for the Crown (*Middleton v. Spicer*) 201

Having unequal legacies, shall take the undivided surplus equally, as if they had no legacies (*Bowker v. Hunter*) 328

*So where some have unequal, and others no legacies (*Oliver v. Freewin*) 590

EXONERATION

Of personal estate from payment of debts.

See DEVISE for PAYMENT of DEBTS.

F.

FINE

Shall not be set up as a bar, where a bill has been filed for relief (*Pinkle v. Thornycroft*) 283

FINE

A TABLE OF PRINCIPAL MATTERS.

FINE *for Renewal of Leases.*

In a beneficial lease, the tenant for life renewing, the fine shall be apportioned between her and the remainder-man in proportion to their respective interests (*Nightingale v. Lawson*) Page 440

† See the note

444

FORFEITURE.

P. T. granted two annuities to his son *P. T.* afterwards by will he gave him another annuity, upon condition that he should release all demands on his estate arising from accounts relative to a transaction between them: The release tendered included the former annuity; the refusal to execute this is no forfeiture of the second annuity; but a release being proposed by the Master going only to the account, a refusal to execute this was held a forfeiture of the annuity under the will (*Taylor v. Popham*) 168

F R A U D.

Lord *I.* dealt for an annuity with *C.* who treated for Lord *I.*'s son (which was unknown to Lord *I.*;) This is not a fraud to vitiate the transaction (*Irnham v. Child*) See also the note. 92

G.

G U A R D I A N.

A petition to assign a guardian (unless to carry on a suit, or protect an interest) must be pursuant to the statute (*Ex parte Becher*) 556

H.

H E I R and D E V I S E E.

See MORTMAIN.

H E I R - L O O M S.

Plate, &c. left by will as heir-looms, to be enjoyed by the persons respectively in possession of the testator's houses; the absolute property will vest in the first tenant in tail who comes into *esse*, and, he dying an infant, in his father as his representative (*Foley v. Burnell*) 274

H U S B A N D.

See BARON and FEME.—INFANT.

I.

I M P E R T I N E N C E.

A reference of an answer to the Master for impertinence, refused to be discharged, although not moved for till after notice of motion for dismissal of the plaintiff's bill for want of prosecution (*Kinworthy v. Allen*) Page 400

I N F A N T.

The marriage settlement of a female infant held to be binding upon her, and no act done by her and her husband can avoid it: Mortgages made, by them, to parties having notice of the trusts, ordered to be assigned to the trustee, but the profits, during the lives of the husband and wife, to be applied to the payment of the mortgages, without prejudice to any remedy the wife might have against the husband's estate (*Durnford v. Lane*) 106

A female infant's marriage settlement, in order to bind her, must be fair and reasonable, not tend to deprive her of every thing: A covenant that whatever should come to the wife, or to the husband in her right, from the mother or otherwise, should be bound by the settlement, controuled to what came from the mother, not extended to property coming from other quarters (*Williams v. Williams*) 152

An infant is bound by an order made by the court, by consent, although there was no reference to the master to enquire whether it would be for his benefit (*Wall v. Busby*) 484

* A title set up against an infant can not be taken notice of on exceptions to a Master's report of maintenance, but must be established elsewhere (*Nicholls ex parte*) 577

See Maintenance.

I N J U N C T I O N.

Where there has been a decree for payment of debts in a suit by trustees; although the parties

A TABLE OF PRINCIPAL MATTERS.

- parties have not proceeded under it, a creditor shall be restrained from proceeding at law (*Brooks v. Reynolds*) Page 183
- Where a bond is given for the enjoyment of a collateral matter, the court will grant an injunction against an action at law for the penalty, and award an issue *quantum damnicatus* (*Sloman v. Walter*) 418
- An injunction shall be awarded against the sale of a book piratically taken from another, but not against a fair abridgement (*Bell v. Walker*) 451
- Where there is an action brought for money received, and the defendant files a bill, admitting to have received the money, it shall be brought into court, or the injunction shall be dissolved (*Sherwood v. White*) 452
- * Injunction granted to restrain defendant from recovering a demand against one of the plaintiffs, he having represented to the agent of the other plaintiff (on a treaty of marriage with his daughter) that there was no such demand existing (*Neville v. Wilkinson*) 543
- * Where a bill is referred for impertinence, before the time for answering is out, the plaintiff cannot have an injunction, of course, for want of an answer; but must move it on notice and affidavit (*Neale v. Wadefon*) 574
- * To restrain defendant from preventing water flowing in regular quantities to a mill granted (*Robinson v. Byron*) 588

See MONEY, WASTE.

INTEREST.

- A residue being devised to an infant, with a remainder over, in case she should die under age, which she did; the interest, between the death of the testator, and that of the infant shall go to her representative (*Chaworth v. Hooper*) 82
- A legacy to be paid at twenty-one with interest at 4 per cent. given to an infant; ordered to be invested in the funds, and if greater interest made, to be for the benefit of the legatee (*Green v. Pigot*) 103
- Interest ordered to accumulate for the benefit of legatees, and the principal to be paid
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- to them at 21; the interest accruing between the time when the elder attained 21, and that when the younger attained the same age, divided between them (*Hawkins v. Coombe*) Page 335
- In a long unsettled partnership account, rendered intricate by neglect of the party, he or his representative shall have no interest on the balance when settled (*Boddam v. Riley*) 239
- Where an executor or an administrator makes interest of the money of his testator or intestate, lying unnecessarily in his hands, by employing it in his trade or otherwise, he shall answer the interest (*Newton v. Bennet*) 359
- S. P. (*Perkins v. Baynton*) 375
- † So of a receiver of tolls, having a salary, (E. of *Lonsdale v. Church*) 362. n.
- So of an assignee using the money of the bankrupt (*Treves v. Townshend*) 348
- Compound interest at 4 per cent. allowed the tenant for life, for the remainder-man's proportion of fines paid for the renewal of a beneficial lease (*Nightingale v. Lawson*) 440
- * On mortgages, calculated upon the principal and interest reported due: but on bonds and legacies, on the principal only (*Perkins v. Baynton*) 574

INTERESTS VESTED,

See VESTED INTERESTS, LEGACY.

INTESTATE,

See EXECUTOR.

King. Where, from want of real skin, Executor shall be trustee for the Crown, 201. L.

LAND.

- Money to be laid out in land will, by a slight expression of the person entitled to it, pass either as personal or real estate (*Pulteney v. Darlington*) 223
- Damages for a breach of covenant to settle an estate, if there are contingent uses, shall be ordered to be laid out in land, but, if the party would be entitled to the land in fee, shall
- 7 T

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shall be paid as money, and if the party be dead, to his representative (*Wade v. Paget*)

Page 363

See REAL and PERSONAL ESTATE.

LEASE.

Leasehold estate held of a college devised, after the will the lease is renewed, the renewed lease does not pass (*Hone v. Medcraft*) 261

† See the case of *Coppin v. Fernyboagh* *Ibid.* n.

Where a lease for lives is renewed by the tenant for life, under a settlement, the renewal shall be to the uses of the settlement (*Pickering v. Vowles*) 197

Upon renewal of a beneficial lease, by the tenant for life, the fine shall be apportioned between her and the remainder-man, according to their interests (*Nightingale v. Lawson*) 440

† But held an annuitant out of leasehold is not bound to contribute (*Maxwell v. Ashe*) 444 n.

See DEEDS.

LEGACY.

A legacy was given to such lying-in hospital as the executor should name; the testator afterwards struck out the name of the executor, the court will sustain the legacy, and appoint what lying-in hospital shall take it (*White v. White*) 12

So of a legacy to repair parsonage houses, the selection of the objects is in the court (*Attorney General v. Bishop of Chester*) 444

Two legacies of equal sums being given to the same legatee, and in the same will, the legatee shall take one only (*Garth v. Meyrick*) see also the note 30

But where one of the legacies is in the will, and the other in the codicil, both shall pass (*Ridges v. Morrison*) 389

See also the case of *Hooley v. Hatton* in the note 390

Legacies were given to six grand children by their christian names, but the name of one was omitted, and that of another repeated; all shall take (*Garth v. Meyrick*) 30

Legacy to the testator's own relations, none shall take but persons within the statute of distribution (*Green v. Howard*) 31

Legacy to A. his executors administrators and assigns shall not pass to the representative, A. being dead: and parol evidence to shew the testator knew of A's. death, and meant the legacy to be transmissible, refused (*Maybank v. Brooks*) Page 84

Legacy to an infant, to be paid at 21, with interest at 4 per cent. ordered to be appropriated (*Green v. Pigot*) 103

Legacy to two, jointly and between them, they are not joint-tenants; and, one dying, the legacy does not survive (*Perkins v. Baynton*) 118

A specific legacy shall bar the wife, being executrix, from taking the undisposed surplus (*Martin v. Rebow*) 154

When the executors have legacies, and there are no next of kin, the executors shall be trustees as to the undisposed surplus for the crown (*Middleton v. Spicer*) 201

Executors having unequal legacies, are not barred from taking the undisposed residue (*Bowker v. Hunter*) 328

*So where some of the executors have unequal, and others no legacies (*Frewin v. Oliver*) 590

Legacies were charged on a real estate, under a viz. then a legacy given out of the personal estate, afterwards other legacies without any fund named, the subsequent legacies are not charged upon the land (*Hone v. Medcraft*) 261

Legacy of a cabinet of curiosities; ornaments of the person, though shewn as part of it, shall not pass (*Cavendish v. Cavendish*) 467

A legacy of a sum of money in long annuities, *prima facie*, means an annuity to that amount (*Stafford v. Horton*) 482

But evidence shall be let in of the testator's estate, to shew it could only mean a gross sum charged thereon (*Fonnerau v. Poyntz*) 472

*To trustees to pay the produce to A. without limiting the duration of the interest is an absolute gift of the principal (*Elton v. Shepherd*) 532

*J. D. gave 5000*l.* to purchase stock, the interest to M. for life, then to W. for life, at his decease to testator's godson S. and at his decease to be divided among his brothers equally: S. was dead at the time of the will made: A. son of W. who would have been a brother of S. had he lived, shall

A TABLE OF PRINCIPAL MATTERS.

shall take a share in the 5000*l.* He also gave 4000*l.* to *L.* for life, and in case he had no children, to revert to *W.*'s. children: A daughter of *W.* who was alive at the time of the codicil made, but died before *W.* had a vested interest, which was held transmissible to her representative (*Devisme v. Mello*) Page 537

*Legacy to the children of the testator's sister at 21, if any died before, to the survivor and survivors: A child born after the testator's death, but during the infancy of the others, shall take a share (*Gilmore v. Severn*) 582

*Of a particular fund to *A.* for life, then to testator's residuary legatees: residue to *B.* and *C.* as tenants in common, the particular fund is part of the residue (*Pitt v. Benyon*) 589

LEGACY,—*Pecuniary or Specific.*

Of 3400*l.* to an hospital is pecuniary not specific (*Bishop of Peterborough v. Mortlock*) 565

LEGACY

Vested or not, See VESTED INTERESTS.

LENGTH OF TIME,

See PRESUMPTION.

LIEN.

A purchaser of a settled estate (without notice of a rent charge granted by tenant for life) transfers stock, to the trustee under the settlement, in payment; the tenant for life grants an annuity to one who had no notice of the transaction: the purchaser of the estate is evicted by the grantee of the rent-charge; he has no lien on the stock transferred (*Cator v. Pembroke*) 301

A purchaser not having paid the money, laid down *arguendo*, but not determined, that the vendor has a lien upon the land (*Blackburne v. Gregson*) 420

The distrainor has no lien upon goods taken in distress for rent and replevied, but is left to his remedy on the replevin bond (*Bradyll v. Ball*) 427

LIMITATION, *Statute of.*

*The rule that a trust is not within the statute of Limitations applies only between trustee and *cestui que trust*, not against a trust by implication, as affected by an equity (*Townshend v. Townshend*) Page 651

M.

MAINTENANCE.

The testator, by his will, provided a maintenance for his son out of the real estate, he then gives large legacies to his younger children with maintenances; the second son is entitled to both the maintenances (*Clive v. Walsh*) 146

A special direction to the Master, in settling an allowance for maintenance to an eldest son, to consider the birth of a posthumous child, refused (*Burnet v. Burnet*) 179

The mother having married again, her 2d. husband is not bound to maintain the children by the former marriage, but shall have an allowance out of their fortunes (*Billingsly v. Critchet*) 268

If the parent be of ability to maintain his children, he shall not have an allowance for that purpose out of the interest of a fortune coming *aliunde*, although it was ordered by the will to be applied to maintenance (*Hughes v. Hughes*) 387

*When the parent is reported not of ability, the sum allowed shall be only from the time of the report not of the decree. *S. C. ib.*

*Exceptions will not lie to a Master's report of maintenance: and a title being set up against the infant must be established elsewhere (*Nicholls ex parte*) 577

MARRIAGE ARTICLES.

By marriage articles, 30,000*l.* was to be raised to pay the debts of the lady's father she having before joined him in raising 24,000*l.* (of which the parties to the settlement had no notice) this sum shall be part of the 30,000*l.* (*Shelburne v. Inchiquin*) 338

MAR-

A TABLE OF PRINCIPAL MATTERS.

MARRIAGE,—*Condition of Marriage.*

- *Testator devises the residue to his children, but if any of the daughters shall marry without the consent of the mother or guardians, her share to go to those unmarried: this is a condition subsequent, and a daughter who married without consent is notwithstanding entitled (*Jones v. E. of Suffolk*)
Page 528

MARRIAGE SETTLEMENT

- *To husband for life, remainder to wife for life, remainder to the heirs of their bodies, is a strict settlement: not so if the power of barring the entail be given to both (*Highway v. Banner*)
584

MERGER.

Where a legal and equitable title to the same lands meet in the same person, the equitable merges in the legal (*Wade v. Paget*) 363

MISREPRESENTATION.

- *Defendant having represented, that *A.* one of the plaintiff's owed him nothing, to the agent of *B.* the other plaintiff, whose daughter *A.* was about to marry, shall not recover against the other plaintiff who was indebted (*Neville v. Wilkinson*)
543

MONEY

To be laid out in land. See LAND.

MONEY to be paid into Court.

- Upon motion that a defendant may pay money into court, a specific sum must be sworn to be in his hands (*Roberts v. Hartley*) 56
- Where there is a suit for money received, and the defendant files a bill for an injunction, admitting to have received the money, he shall pay it into court, or the injunction shall be dissolved (*Sherwood v. White*) 452

See ACCOUNT.

MORTGAGE.

- The third mortgagee buying in the first mortgage, even *pendente lite*, shall unite his se-

curities and postpone the second (*Robinson v. Davison*)
Page 63

Where the legal estate is in a mortgagee, the subsequent securities, being merely equitable, shall have priority according to their dates (*Becket v. Cordley*) 353

Where a man buys an equity of redemption, the purchased estate shall pay the debt, notwithstanding there be a term created for payment of debts (*Ancafter v. Mayer*) 454

*A decree of foreclosure, though pronounced on motion (under 9 Geo. 2. c. 20.) cannot be discharged on motion (*Cadle v. Fawle*)
515

*Upon a bill to redeem, and non-payment at the time appointed, it is a motion of course to dismiss the bill (*Stewart v. Worral*) 581

See MORTMAIN.

MORTMAIN.

A legacy to the corporation of Queen Ann's bounty is void; as, by the rules of the corporation, it must be laid out in land. (*Widmore v. the Corporation of Queen Ann's bounty*)
13 n.

A charge on the devised estate, void by the Statute of Mortmain, whether it shall sink for the benefit of the devisee, or go to the heir (*Wright v. Row*) see also the note 61

Devise to a corporation in trust, although it be void, the trust shall attach upon the estate the law raises (*Sonley v. the Clock-makers Company*)
81

Money upon mortgage in England given to a charity in Ireland, the executrix by her will affirmed the legacy; this was held to be an admission of assets of the testator and not within the statute of mortmain (*Campbell v. Radnor*)
271

Money left to repair parsonage houses, is not within the statute of mortmain (*Attorney General v. Bishop of Chester*)
444

† So to build a parsonage house where no land is to be purchased (*Brodie v. D. of Chandos*)
444 n.

† S. P. (*Attorney General v. Bishop of Oxford*)
Ibid.

† But money given to erect a new school house, there being no land on which to erect it, is void (*Attorney General v. Hutchinson*)
Ibid. n.

S. P.

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S. P. (*Pelham v. Anderson*) Page 444

† So real and personal estate to be sold, and part of the money to be laid out in the purchase of land to erect and endow an almshouse, is void (*Attorney General v. Tyndall*) 444

* Money given by will to be laid out in the purchase of heritable securities in Scotland for the use of a charity not within the statute (*Oliphant v. Hendric*) 571

N O T I C E

To an agent, in order to affect the principal, must be to an agent empowered to treat, not barely to carry proposals from one party to another (*Shelburne v. Inchiquin.*) 338

See PAROL-EVIDENCE.

O.

O F F I C E.

A bond given for the purchase of an office, to which the groom of the Stole had the power of recommendation, is within the mischief of marriage brocage: a perpetual injunction therefore granted. (*Hanington v. Ducatel*) 124

P.

P A T E N T.

* The date of a patent cannot be altered, though it has not been enrolled in due time by mistake (*Beck ex parte*) 578

P A R T I E S.

* Where the personal representative is a mere formal party, the Court will go on, and suffer him to be brought before the Master (*Fletcher v. Ashburner*) 497

P E R S O N A L E S T A T E.

For the exemption of personal estate from payment of debts,

See DEVISE for PAYMENT of DEBTS.

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P L E A.

The putting in of a plea is a sufficient compliance with an order for time to answer (*Roberts v. Hartley*) Pag 56

But the plea appearing to be for delay, it was ordered to be argued the next day (S. C.) *Ibid.*

And being a plea of a sentence of the Admiralty court, which was recited in the bill, and therefore bringing no new matter before the court, it was over-ruled (S. C.) *ibid.*

Plea that a writ of right had been tried and determined against the plaintiff, (who was demandant in the writ of right) a good plea to a bill for discovery of defendant's title (*Leicester v. Perry*) 305

Plea of the statute of frauds, to a bill for specific performance of an agreement for the sale of an estate, averring 1. that there was no agreement in writing, 2d. that there was no part-performance of such agreement, is a double plea;—ordered therefore to stand for an answer, with liberty to except (*Whitbread v. Brockhurst*) 404

Plea to a bill of revivor, that it was for costs only; the costs having been ordered to be paid into the bank, plea over-ruled (*Hall v. Smith*) 438

* Upon a bill to discover articles pawned to the defendant, he pleads that being a pawnbroker he lent money, without notice of plaintiff's claim: the plea should aver that he has no other articles than those specified, and though this was done by the answer, that is not sufficient (*Hoare v. Parker*) 578

P L E D G E.

A. having made an insurance, for the benefit of B.'s testator, left the policy in the hands of the broker, who was his creditor, as a pledge: A. became a bankrupt; this is not a fraudulent leaving of the policy in the hands of A. by B.'s testator, within 21 Jac. 1. c. 19. (*Falkener v. Case*) 125

Pledge of a lease, by a person who afterwards became a bankrupt, carried into execution against the assignees (*Russel v. Russel*) 269

† See also the Note *Ibid.*

7 U

PORTION.

A TABLE OF PRINCIPAL MATTERS.

P O R T I O N,

See POWER,

Whether vested or not

See VESTED INTERESTS.

P O W E R,

Under a power to appoint among younger children, one who becomes an eldest, cannot take a share appointed to him *nominatim* (*Broadmead v. Wood*) Page 77

Will, under a power, not attested to pass real estate, is a good execution as to the personality (*Duff v. Dalzell*) 147

A power was given, by marriage settlement, to the husband to raise 10,000 l. for a single younger child *when he should think proper*,—the child (a female) being fourteen years old, he called upon the trustees to raise the portion immediately, and afterwards, the child being dead, filed his bill to have it raised as her administrator.—Bill dismissed (*Hinchinbroke v. Seymour*) 395

A power to be executed by deed attested by three witnesses, is executed, *in consideration of marriage*, by deed attested by two witnesses only:—This defect, in the execution of the power shall be supplied (*Wade v. Paget*) 363

A power in a marriage settlement was created to I. P. (the husband) to appoint the settled estate among the children, in such shares as he should think proper, not exceeding estates-tail. He appointed to two of the children, *one acre for their lives* and the life of the survivor, then to fall into the residue, which he appointed to his second son for life with remainders over.—This execution is elusory and bad (*Pocklington v. Bayne*) 450

*An appointment under a power, by will, is revocable by a subsequent appointment by deed, though no power of revocation is reserved in the will (*Lisle v. Lisle*) 533

Benegative. see King.

P R E S U M P T I O N.

*A mortgage term being made the subject of a settlement after marriage with a second

wife, but recited to be in pursuance of articles previous to the marriage, (the settlor having children by the deceased wife) under the uses of which the plaintiff claims, was afterwards conveyed by settlor and his wife (by fine and settlement) to uses for the benefit of the children by the first marriage, who, and their representatives, had been in possession 30 years: plaintiff's bill dismissed, as the Court will presume that the former settlement was known to be voluntary, or the children by the second wife to have had a compensation for their claims (*Townshend v. Townshend*) Page 55

P R I O R I T Y

Of satisfaction among equitable securities, shall be according to the priorities of their dates (*Becket v. Cordley*) 353

P U R C H A S E.

Where money is to be laid out in purchases, a separate application must be made to the court upon each purchase (*Harrington v. Flemming*) 74

P U R C H A S E R.

Where land is ordered generally to be sold, the purchaser is not bound to see to the application of the money (*Smith v. Guyon*) 186
†See also the cases of *Jebb v. Abbot* and *Beynon v. Gollings*, in the note. *ibid.*

P U R C H A S E R without Notice,

See LIEN.

R.

R E A L and P E R S O N A L E S T A T E.

*Where a real estate is ordered to be sold, and is blended with personal property, it becomes personality, and shall go accordingly (*Fletcher v. Ashburner*) 497

*But where they are to be blended, only for particular purposes, (as to pay certain legacies, which lapse by the death of the legatees in the life of the testator) then so much as is real shall result to the heir, and so

A TABLE OF PRINCIPAL MATTERS.

so much as is personal to the personal representative (*Ackroyd v. Smithson*) Page 503

RECOVERY

Will bar equitable as well as legal remainders, but the estates must be completely legal or completely equitable; therefore where there was an equitable estate for life, with a legal estate-tail, the recovery did not operate (*Boteler v. Allington*) 72
S. P. (*Shapland v. Smith*) 75
 See the case of *Salvin v. Thornton* *ibid.* n. †

*A recovery suffered by a person not in possession, has no operation *Wynne v. Cookes*

515

REFERENCE.

Where the matter of a cause has gone to a reference, it cannot come on upon exceptions to the award, but upon further directions (*Woodbridge v. Hilton*) 398

REFERENCE to the Master.

To enquire whether the plaintiffs were natural children of the testator, refused, there having been sufficient in the bill to raise the question under a former reference. (*Grave v. Salisbury*) 425

RELATIONS,

By a bequest to relations, those within the statute of distribution, alone, shall take (*Green v. Howard*) 31

RENT-CHARGE.

A clear rent-charge whether free from land-tax 4 n. †

See LIEN.

REPUBLICATION

Of a WILB.

†A codicil is a republication of a devise revoked by marriage and a settlement (*Jackson v. Hurlock*) 61 n.

RESULTING TRUST,

See TRUST.

REVERSION.

By a devise of ground-rents, the reversion passes (*Kaye v. Laxon*) Page 76
 The question whether a reversion (after several estates-tail) falling in after the death of the reversioner, be assets to pay his debts agitated but not determined (*Tweedale v. Coventry*) 240

REVOCATION.

Sale of the devised estate, by the testator, is a revocation of the will (*Arnald v. Arnald*) 401
 †Marriage with, and a settlement on, the devisee, is a revocation of the devise (*Jackson v. Hurlock*) 61 n.

S.

S A L E.

After a sale before a Master, the biddings may be opened upon special circumstances, but ought not merely upon inadequacy of price (*Prideaux v. Prideaux*) 287

See REVOCATION.

SATISFACTION.

A sum of money, left subject to the life interest of the mother, shall go in satisfaction for a child's portion by settlement (*Rickman v. Morgan*) 63
 So shall the residue of the personal estate given to the child by will (*S. C.*) *ibid.*
 †A legacy is a satisfaction of a portion, but not of the residue, or of a real estate devised (*Watson v. Lord Sondes*) 65 n.
 Part of the wife's fortune being settled (after the decease of the husband and wife) upon the children, according to her appointment:—
 The husband left a larger provision to trustees, to the use of the wife for life, remainder to the children as she should appoint:—
 This

A TABLE OF PRINCIPAL MATTERS.

This is a *satisfaction* for the portions (*Moulson v. Moulson*) Page 82
 Bond on marriage, to secure 300 l. the wife's fortune, to her *within one month* after the husband's decease: He by will gave her 500 l. payable in *six months* after his decease:—
 This is *not a satisfaction* (*Haynes v. Mico*)

129

Legacies to the heir at law, *not a satisfaction pro tanto* for money to be raised by a trust-term, which descended, the owners having made no appointment (*Cantle v. Morris.*)

133 n.

A. gave to Lady S. and to J. C. legacies, after a general failure of issue of her brother; the brother afterwards by his will, gave the legatees equal legacies: held to be a *satisfaction*, though Lady S.'s legacy (she being a *feme-covert*) in the brother's will, was to her separate use (*Attorney General v. Hird*)

170

The testator gave a bond to trustees, conditioned that his executors should pay 5000 l. to a natural son at twenty-one.—By will he gave 15,000 l. to trustees, to pay to the son a maintenance until twenty-five, and then to pay the whole to him, with contingencies on marriage: This is *no satisfaction* of the bond (*Jeacock v. Falkener*) 295

By marriage-settlement 10,000 l. were to be raised for younger children:—The settlor by will gave the younger children 2000 l. each: This is a *part satisfaction* (*Warren v. Warren*) 305

The value of a beneficial lease granted to a natural son, held *not to be a satisfaction* of a legacy given by the putative father's will (*Grave v. Salisbury*) 425

*A father by his will gives his son 500 l. he afterwards takes him into partnership: the stock being 3,000 l. this is *not a satisfaction* for the legacy (*Holmes v. Holmes*) 555

SEQUESTRATION

For not restoring papers, an order having been made, and served personally.—(In the Matter of *Hassenclever*) 434

SETTLEMENT

By the son, tenant in tail in possession (in consequence of an agreement, made dur-

ing the life of the mother (who was tenant for life) and being beneficial to the family, not set aside,—though made at the instance of the father, who took an interest under it (*Kinchant v. Kinchant*) Page 369

See BARGAIN.

SPECIFIC PERFORMANCE,

See BILL.

SURVIVORSHIP.

*A survived share shall not survive again without express words (*Ex parte West*) 757

T.

TENANT-RIGHT ESTATE,

See LEASE.

TERMS OF YEARS.

If a man purchase terms of years in the name of a trustee, and the inheritance in his own name, or *vice versa*, the terms are in gross, not attendant upon the inheritance (*Scott v. Fenboullet*) 69

A term created by a marriage-settlement, to raise 1,000 l. to be paid to such of the relations of A. as the survivor of A. and B. shall appoint, the inheritance afterwards comes to A. who devises the estates to B. the term continues to be a subsisting term, and goes to the heirs at law of A. (*Cantle v. Morris*) 133 n.

A. by her will gave legacies to some of the heirs at law, they are *not satisfactions pro tanto* for their shares of the 1,000 l. (*S. C.*) *ibid.*

Although the devisees were relations of A. the will did not operate as an appointment to them (*S. C.*) *ibid.*

TIMBER.

Where lands are exchanged, under acts of inclosure, tenant for life, impeachable of waste, cannot cut timber for the inclosure, 1

A TABLE OF PRINCIPAL MATTERS.

sure, but must raise money under the powers
in the act (*Lee v. Alston*) Page 194

See WASTE.

T R U S T.

Where the trustee is deficient, the trust shall
attach on the estate the law raises (*Sonley
v. the Clock-makers Company*) 81

TRUST *resulting.*

A conveyance of land, to raise a sum of money,
and pay the interest to *A.* until marriage,
then to pay her the principal; *A.* never
marries:—This is a resulting trust to the
settlor, but in his hands is personalty, and
passes by the bequest of the residue in his
will (*Hewit v. Wright*) 86

*Real and personal estate ordered to be sold
to pay debts and legacies, the residue to
certain legatees, in proportion to their le-
gacies: two of the residuary legatees died
in the life of the testator: their shares
are lapsed, and so far as they consist of
real estate shall result to the heir at law,
and so far as they are personal to the next
of kin (*Ackroyd v. Smithson*) 503

See REAL and PERSONAL ESTATE.

T R U S T E E

Concealing the breach of trust of his co-trus-
tee, shall be equally liable with him for
the money, to the *cestui que trust* (*Boardman
v. Mosman*) 68

T R U S T E E *for preserving Contingent Remainders.*

*The court will not compel a trustee for pre-
serving contingent remainders to join in a
recovery, unless to continue the estate, or
under very particular circumstances (*Bar-
nard v. Large*) 534

VOL. I.

T Y T H E S.

By a devise of all the testator's tythes, he hav-
ing freehold tythes, and also tythes by lease
perpetually renewable without fine, the
latter passed as well as the freehold tythes
(*Turner v. Hufner*) Page 78

V.

V E S T E D I N T E R E S T S.

By marriage settlement 1500*l.* was provided
for younger children in such shares as the
parents should appoint, in default of ap-
pointment to all the children after the death
of the wife; the parents afterwards made an
appointment excluding one child, this deed
vests the portions in the other children
born or to be born (*Mayhew v. Middle-
ditch*) 162

Personalty was given to trustees, to pay the
dividends to *A.* (one of the testator's chil-
dren,) at twenty eight, or *marriage with
consent*; and in case any of the children
should die before their shares became due,
the share to go to the rest of the children,
and their issue *per Stirpes*: *A.* married
without consent, and died under twenty-eight,
leaving a child; the portion did *not vest*,
but, the testator having five children, held
that one fifth vested in *A.*'s child, and it
was decreed to her father as her represen-
tative (*Hemmings v. Munkley*) 303

Bequests of 3 *per cent.* annuities to the ex-
ecutors, to the use of *A.* and her daughter
B. and the longer liver of them, then to the
issue of *B.* (if he should have any such) if
not, to the use of *C.* till he should come of
age, *C.* died living *B.*, the fund vested in
C. and the trust is only the mode (*Atkinson
v. Paice*) 91

Bequest of the residue of personalty to testator's
wife for life; if she die without issue, to the
testator's two brothers, or if one of them be
dead, then to the survivor; both the brothers
died, living the wife: This is an execu-
tory

7 X

A TABLE OF PRINCIPAL MATTERS.

tory devise *vested in both*, and transmissible to the executor of the survivor (*Barnes v. Allen*) Page 181

Devise to *A.* (after death or marriage of the testator's wife,) charged with 100*l.* to *B.* who died during the life of the wife, the legacy *vested*, and was transmissible (*Godwin v. Munday*) 191

The estate was devised to testator's wife for life, and, if there should be no issue between them, then to *A.* charged with two sums to *B.* and *C.* afterwards *B.* being dead, the testator by codicil, ordered that legacy to be paid to *C.* and *D.* *C.* died in the lifetime of the wife; the legacy was *vested* and transmissible (*Killet v. Dawson*) 119

See *Tunstall v. Bracken* ibid. n.

The testator gave the use of 800*l.* to his wife for life, and, after her decease, disposed of part of the principal, he then gave to *A.* 100*l.* *A.* died, living the wife, this legacy to *A.* *vested* in him (*Monkhouse v. Holme*) 298

Testator gave 20*l.* each, to the children of *A.* (after the death of annuitants) the legacies *vested* in all the children born, and also in one born after the death of the testator, but during the life of the surviving annuitant (*Attorney General v. Crispin*) 386

Bequest of 1000*l.* to testator's sister; and in case of her demise, 800*l.* to *A.* and 200*l.* to *B.* the sister has a life estate only with *vested* remainders in *A.* and *B.* in the proportions (*Billings v. Sandom*) 393

Bequest of all the testator's estate to his wife; in case of death happening to her, his executors to take care of the whole for his daughter, the wife has an estate for life with a *vested* remainder in the daughter (*Nowlan v. Nelligan*) 489

**S. D.*, by a codicil, gave 1000*l.* to *L.* for life, and in case he had no children to revert to *W.*'s children: A daughter of *W.* who was alive at the time of the codicil made, but died before *W.*, had a *vested* interest, which was held transmissible to her representatives (*Devisme v. Mello*) 537

See LEGACY.

W.

W A S T E.

Upon motion for injunction to stay waste, a particular title must be shewn (*Whitelegg v. Whitelegg*) Page 57

Devise of lands to be sold, and other lands to be purchased, in which *A.* should be tenant for life without impeachment of waste; the rents and profits of the estates to be sold, to be to the use of the persons who would be entitled to those of the estates to be purchased: The tenant for life cannot cut down timber on the land to be sold (*Plymouth v. Archer*) 159

A. by will, made his wife tenant for life; by codicil he gave her permission to cut timber during widowhood at seasonable times: She shall be restrained from cutting ornamental or immature timber (*Chamberlyne v. Dummer*) 166

W I F E,

See BARON and FEME.

W I L L.

A will being attested by the witnesses, where the testatrix could see them through the windows of her carriage, and of the attorney's office, is a good attestation in her presence (*Casson v. Dade*) 99

A will, made under a power, not attested to pass real estate, is a good execution of the power, as to the personalty (*Duff v. Dallszell*) 147

See DEVISE, LEGACY, POWER, &c.

W I T N E S S

Not to be re-examined before a Master, as to matter to which he has been examined in chief, but by order (*Sawyer v. Bowyer*) 388

†Examined before hearing, not to be examined on a commission without order (*Vaughan v. Lloyd*) ib. n.

W R I T

A TABLE OF PRINCIPAL MATTERS.

WRIT of *Assistance*.

After an order to the tenant in possession to deliver up the possession to a purchaser, service of a writ of execution of that order, attachment, and injunction personally served, and affidavit of the facts and of disobedience, a writ of assistance shall issue (*Dove v. Dove*)
Page 375

WRIT of *ne exeat regno*

Shall not issue where there has been a payment of the debt in *Carolina*, in paper currency, which, at that time, was a legal payment, though an ordinance has been since made decrying it (*Anon*) Page 763

F I N I S.

ERRATA.

E R R A T A.

In the ADDRESS prefixed to this EDITION,

1. 5. *for* "even" *read* "ever."

In the BODY of the WORK.

- Page 4. last line, *for* "Dacosta v. Villa-real" *read* "Villa-real v. Lord Galway."
111. l. 8. from the bottom,—the *Asterisk* ought to be *after* "Young Man" in the next line.
124. *for* "Haneington" *read* "Hanington."
144. Note, *read* "according to the doctrine of this case several others have been determined."
199. last line of the Marginal Abridgment, *for* "Trustee" *read* "Tenant."

In the APPENDIX.

499. l. 17. *for* "Malrabar v. Malrabar" *read* "Mallabar v. Mallabar."
536. l. 6. *for* "384" *read* "308."
16. *for* "Frevin" *read* "Frewin."
24. *dele* "3 Wms. 279."
-

A D D I T I O N S, &c.

T O

R E P O R T S O F C A S E S, &c.

[†] Page 4, last line, the note stands thus :

[†] This point has been much contested, In *Brewster v. Kitchen*, 1 Lord Raymond 317. & *Salk.* 198. a *clear* annuity was held to be free from land-tax. But in the case of *Green v. Maygold*, 8 Vin. Abr. 411. tit. *Devise*, 30 l. a-year was to be paid *free from all deductions*; the Master of the Rolls held land-tax not to be one of those deductions. In the Duke of *Ancafter v. Lady Sherard*, 2 Vezey 499. jointures not exceeding 1,000 l. *per annum* was held not to be free from land-tax. In *Villa Real v. Lord Galway*, Lord Camden was of opinion that such a rent was not clear of land-tax; the words of this devise may be seen *post.* 292. n. where it is cited for another purpose. His Lordship's reasoning on this part of the case is as follows: "The question then is, Whether the rent charge is to be free from land-tax by these words, "clear yearly payment." I am of opinion it is not, because all such rents are charged with the land-tax by the act of parliament, with this exception only, that the act shall not make void the agreement between landlords and tenants. This act is an annual charge, and every person possessed of such an estate, must take it with its parliamentary burthen, unless the grantor has expressly discharged it; the land-tax is a collateral duty imposed by the Legislature, and must therefore be paid by the owner of the rents unless it be otherwise agreed between the parties and so expressed." Notwithstanding these cases, however, the point seems at present to be settled, that such a rent charge is free from land-tax: See *Bradbury* against *Wright*, *Douglas* 602. citing the case of *Champernoon v. Champernoon*, Ch. 1780, where the words were "free from taxes," and the annuity was held to be clear of land-tax.

[†] Page 12, end of the case of *Gwynne v. Heaton*.

[†] *V. Henley v. Axe*, *post.* vol. 2. p. 17, and *Heatbct v. Paignon*, *ibid.* 167.

[†] Page 21, end of the case of *Hulme v. Tenant*.

[†] Vide *Stamford v. Marshall*, 2 Atk. 68.

[†] Page 27, in the text, instead of the 7th line of the state of the case, and the 8th to the word "party" read "parties on whose account the loan was negociated," line 13, instead of "another party was dead." after *Staples*, add "died pending the suit" l. 14. after "bankrupt," add "and his assignees were brought before the Court." l. 21, and 22. omit "and that it

a

was

was not necessary to bring the representatives of the dead parties before the Court."

[†] Page 32, l. 5, from the bottom, after "admissible"

[†] As to this point see the case of *Fonnereau v. Poyntz*. *Post*. 472.

[†] Page 52, end of the case of *Saddington v. Kinsman*.

[†] See as to the subject of this case, *Worral v. Marlar*, and *Busbuan v. Pell*, in the note in Mr. Cox's edition of *Peere Williams's Reports*, vol. 1. p. 450.

[†] Page 54, end of the case *Pember v. Mathers*.

[†] See *Janson v. Rany*, 2 *Atk.* 140. *Leneve v. Leneve*, 1 *Vez.* 66. *Arnot v. Biscoe*, *ib.* 97. *Reech v. Kennegal*, *ib.* 125.

[†] Page 57, l. 5. after "compliance with the order;"

[†] Otherwise of a demurrer, though only to part and answer to the other part. *Vid.* *Kenrick v. Clayton*, *post*. vol. 2. p. 214.

[†] Page 61, end of the case of *Wright v. Row*.

[†] In *JACKSON v. HURLOCK*, before Lord *Northington*, 24th of November, 1764, Sir *John Hartop* had, by his will, given an estate to Mrs. *Marsh* (whom he afterwards married and made a settlement upon her) subject to payment of 10,000 *l.* as he should direct in writing; and he afterwards directed it to be paid to charities; After the marriage, he made a codicil affirming his will. Lord *Northington* held the devise revoked by the will and settlement, but re-published by the codicil, and that the charge sunk for the benefit of the devisee. In *BLAND v. WILKINS*, February, 1782. Lands were given to *E. N.* in fee, upon condition that her executors and administrators should pay 10 *l.* to a charity; Sir *Thomas Sewell* held the 10 *l.* should go to the heir, as part of the produce of the land undisposed of.

[†] Page 65, after "*Pelham v. Lord Lincoln*,"

[†] *WATSON v. Lord SONDES* (the same case as *PELHAM v. Lord LINCOLN*) 9th and 10th of August, 1756. The question arose upon the will of Mr. *Pelham*, who, having four daughters, appointed a sum of 10,000 *l.* over which he had a power under his marriage settlement, among his daughters, excepting lady *Lincoln* (whom he had advanced); and also gave his personal estate among his other daughters, likewise excepting lady *Lincoln*. On the 28th of August, 1752, his daughter *Grace* married Mr. *Watson*. Mr. *Pelham* gave her 20,000 *l.* by applying part of the 10,000 *l.* and other means, for her fortune: and the question was Whether the legacy, given by the will, was satisfied by the portion. Lord *Hardwicke* laid down the rule, and gave two reasons for it; 1st. that the court leans against double portions; 2^{dly}. That a portion is a payment of the debt of nature; therefore being of opinion that the gifts were by way of portion, he decreed that they were a satisfaction of the legacy; but as to the 3^d. part of the residue of the personalty, and also the real estate devised, it was not a satisfaction of those.

[†] Page 68, end of the case of *Rickman v. Morgan*.

[†] *Vide post*. vol. 2. p. 394, his Lordship's judgment on this cause.

[†] Page 73, line 11, *Salvin v. Thornton*.

SALVIN

[†] SALVIN against THORNTON.—*John Thornton*, seised of the premises for life, with remainder to his first son *Thomas* in tail male, remainder to his second son *James* in tail male, remainder to himself in fee, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by *Kenneth Mackenzie*, in trust for *Thomas* (the tenant in tail). *Thomas*, thus having the equitable estate for the life of his father (the legal estate being in the trustee) and the legal estate tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to plaintiff. *James* the second son took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested), and died leaving two daughters, the defendants, who were in possession. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the *Rolls*, the great question in the cause was, whether the recovery suffered by *Thomas*, who had an equitable estate for life, and a legal estate tail, was capable of barring the legal remainder; and upon very full argument, these points were laid down by his Honor, and seemed to be the sense of the whole bar. 1st, That a recovery may be suffered of an equitable estate. 2dly, That such a recovery can only affect equitable remainders. 3dly, That a recovery of an equitable estate must, in all respects, imitate a legal recovery, and therefore that the person suffering an equitable recovery, must have such an equitable estate, as, had it been a legal estate, would have enabled him to suffer a legal recovery. 4thly, That an equitable estate cannot, in suffering a recovery, be blended with a legal estate. 5thly, That as the recoveries suffered of those different estates are perfectly distinct from each other, a recovery of either estate shall not affect the other, the recoveree of the legal estate being always the trustee of the possessor of the equitable estate, and the recoveree of the equitable estate becoming always the *cestui que trust* of him who has the legal estate. Upon this doctrine, therefore, the bill was retained for a year, with liberty for the plaintiff *Salvin* to try the validity of the recovery of *Thomas*, at law. But it was the opinion of the Court, that, as *Thomas* not having such an estate as would have enabled him to suffer a perfect legal, nor a perfect equitable recovery, that it was totally invalid.

Page 75, line 2, in the text, “*against*” is “in favour of.”—At the end add the following to the note.

“ And the advertisement prefixed to the 2d vol. of *Vernon*.”

Page 76, line 10. text, “Exception over-ruled,” is “Exception allowed.”

[†] Page 78, end of the case of *Broadmead v. Wood*.

[†] See the case of *Nicolls v. Sheffield*, *post*. vol. 2. p. 215.

[†] *Ibid*. End of the case of *Lee v. Pascoe*

[†] And it seems that the motion and order must be special to *plead, answer, or demur*; for if it be only to answer, although a plea will satisfy the order (*v. Roberts v. Hartley*, *ante* p. 56.) yet a demurrer (though only to part and answer to the other part) will not. See *Kenrick v. Clayton*, *post*. vol. 2. p. 314.

[†] Page 79, line 2, after “acknowledged.”

[†] Particularly by Lord *Hardwicke* in *Chapman v. Hart*, 1 *Vez.* 271. where the testator having freehold estates near *Fowey*, made a will, by which he devised all his lands and tenements near *Fowey*; but his will was not attested in the manner directed by the statute of frauds. Lord *Hardwicke* refused an enquiry, whether the testator had leaseholds near *Fowey*; because, if it should come out that he had leaseholds there as well as freeholds, the plaintiff

plaintiff (the devisee) could take nothing, for the freeholds only would pass. Lord *Hardwicke* (according to a manuscript note the reporter has seen of that case) expressly declared he held the case of *Rose v. Bartlet*, (which he referred to for this position) to be good law.

[†] Page 90, at the end of the case of *Hewitt v. Wright*.

[†] See the case of *Levit v. Needham*, 2 *Vern.* 138. That the residue of a term raised for a particular purpose, when the purpose is answered, shall vest in the heir, but he must have it as a term, which must go in a course of administration, and not in a course of descent. The decree therefore, in that case, was for the administrator of the heir, and not for his heir.

[†] Page 95, end of the case of *Irnham v. Child*.

[†] See also the case of Lord *Portmore v. Morris*, *post.* vol. 2. p. 219.

[†] Page 99, line 7, after "was" add "accidentally."

[†] *Ibid.* line 10, after "her" insert "one of them delivered it to her, telling her they had attested it."

[†] Page 100, last line, end of the case of *Hassel v. Simpson*.

[†] See this case also, 1 *Cooke's Bankrupt Laws*, p. 110. (2d edit.) also the case of *Kettle* and others, assignees of *Ewing v. Hamond*, *ibid.* p. 111. accordingly.

[†] Page 103, end of the case of *Cullen v. the Duke of Queensberry*.

[†] The defendants appealed, from this decree, to the House of Lords, where the same was affirmed *March* 23, 1787, after a hearing of three days.

[†] Page 106, end of the case of *Green v. Pigot*.

[†] See the case of *Phipps v. Annesley*, 2 *Atk.* 57, 58. In *Gawler v. Standerwicke*, *Rolls*, *November* 15, 1787, legacies were given to infants out of land (charged generally with debts) payable at 21, with interest at 3 *per cent.* One of the infants dying before that age, Sir *Lloyd Kenyon*, after great consideration, decreed that the legacy lapsed. *February* 16, 1788.

[†] Page 111, 7th line from the bottom, after "young man."

[†] *Sed vide post.* *Slocombe v. Glubb*, 2 vol. p. 545.

[†] Page 124, end of the case of *Dawson v. Killet*.

[†] The case of *TUNSTAL* against *BRACKEN*, *East.* 1753, *Canc.* (in giving judgment upon which, Lord *Hardwicke* considered the former cases and the principles upon which they had been decided,) being no where in print, the reporter thought an accurate note of it would be acceptable to the profession.

The testator devised an estate of 111 *l. per annum* to one of his sisters and co-heiresses, paying 100 *l. per annum* clear of all deductions and impositions whatsoever, to his wife during her life, and within 12 months after her decease, to pay several legacies to the value of near 2,000 *l.* Legatees to the value of 1,600 *l.* survived testator but died before the wife.

Qu. Whether the legacies are lapsed or transmissible to executors, as vested legacies ?

LORD HARDWICKE, *Chan.*

This cause arises upon the head of cases in this Court, that are extremely various, and extensive, and may be pretty difficult to reconcile together. I cannot but think, after all, that if the Court should determine this to be sunk into the estate, it would be a very hard case, and contrary to the intention of the testator. It appears manifestly to me, he intended to make provision for a child, in case there should be any, and if no child, then he intended a provision for his sister, who was one of his co-heirs at law ; and there is a clause which has not been taken notice of at the bar, which, though it does not afford a strong argument, yet it is a little material in this case. He says, provided my wife shall be *privement enseint* of one or more child or children, if such child shall attain 21 or marriage, then I do hereby revoke the legacies by me given.

It is truly said at the bar, that it is the general rule of this Court, where legacies are to be raised out of land, and the legatee dies before the time of payment, it is a lapsed legacy upon the foundation of *Pawlet's* case.

But that rule is liable to several exceptions, according to the circumstances of many cases cited upon those occasions, which make a distinction between portions given by a parent to children, or where given by a collateral person. The Court will consider the intention of the testator ; for in the case of portions to children, the Court considers the very purpose for which such portion is given, and if the child dies before such portion is wanted, it will sink into the estate for the benefit of the heir, (*2 Vern. 439, Ch. Pre. 195*).

King and Withers (*Forrest, 117*.) was the case of an additional portion, and it was a strong case to make that payable.

There are other cases where the Court has laid hold of the particular circumstances of a will so as to take it out of the general rule, and decreed it according to the intention of the testator.

Lowther and Condon, 2 Atk. 180. has been cited : I do not think it is applicable to either side.

In this case, there are two particularities. It is directed to be paid to the daughter, her executors, administrators, or assigns : another circumstance was, the testator had in one particular event, on which the moiety of the portion depended, expressly directed, if that daughter did not attain her age of 21, her portion should go to the sister, and not sink into the estate for the benefit of the heir at law.

Another case was mentioned (*Hodgson and Rawson, 1 Vez. 44.*) it is, in the state of the case, as near to this case as one can be to another, and held to be transmissible.

The case much relied upon by the defendants, is *Hall v. Terry, (1 Atk. 502.)* I looked into my notes of it last night ; and there the whole of the gift depended upon the time of payment. If the gift is only with a direction to pay, the Court will not look upon it as a vested legacy.

The next is *Bradley v. Powell*, by Lord Talbot (*Forrest 193.*) I have a great opinion of his judgment, but yet if I had then heard that case, I should not have been of that opinion, for I think it a very hard case.

Consider this upon the plan of this will,—The testator clearly intended, if he left no child to provide for the other branch of his family. It is impossible to say, here is not sufficient to pay the legacy, for here is an estate of 111*l.* *per annum*, which would sell for a considerable sum of money, and he certainly intended that for the other branch of this family, the children of this other sister; therefore their representatives are entitled to it.

I think I may go further than 3 *Co. Boraston's* case, notwithstanding what has been objected, according to the doctrine laid down, *Willock and Hammond*, (*Cro. Eliz.* 204.) Although, in the case of a will, the word *paying* makes a condition, the law will construe this unapt word to a limitation: for if it should be a condition it would descend to the eldest son, and would be at his pleasure, whether his brothers or sisters should be paid or not; therefore it was adjudged the law would construe it a limitation, and to amount to as much as if he had made a devise to his eldest son till he should make default of payment, of which the younger son might take advantage.

According to the reasoning of these cases, it cannot be considered a condition, but a conditional limitation.

But here the co-heir might bring an ejectment for a moiety of the estate for non-payment, and a moiety of this estate will be sufficient to pay all the legacies; therefore this is distinct from the other cases as here is a remedy at law.

[†] Page 129, end of the case, *Moore v. Moore*.

[†] In the case of *Green v. Symonds*, 27th of February, 1730, the testator, by will, gave to *B. int. alia.* all his goods, &c. in his study, except his books and writings; he gave to *C.* all his books, at his chambers in the Temple. At the time of the testator's death, there were, in his study, a considerable sum of ready money, and securities for money, and plate; but he had removed the books into the country. One of the questions agitated in the cause, and which applies to the principal case was, whether *B.* should take the money, securities, &c. which were in the study, or the furniture only. The Lord Chancellor held the money and plate to pass, but not the securities for money, they being *choses in action*. 2dly, That the removal of the books annulled the legacy, because a will of personalty shall only be construed from the death of the testator. With respect to this latter point, Lord Hardwicke in the case of *Chapman v. Hart*, distinguished between the cases of goods in a house, and in a ship; in the latter case, he held, that the removal was no ademption of the legacy; in the former it would, unless it was from necessity, as, removal of goods to save them from fire, which is no ademption, because, in every case of ademption there must be something to shew a change of intent.

[†] Page 133, the end of the case *Haynes v. Mico*, the note continues thus

In *Dewese v. Pontet*, at the Rolls Michaelmas 1785, (reported by Mr. Finch, in a Note upon the case of *Brown v. Dawson*, in his edition of *Pre. Ch.* p. 240.) his Honor recognized the principles of this case of *Haynes v. Mico*; and determined accordingly.

[†] Page 136, 3d line from the bottom, after *Gilpin's* case.

[†] In *HARGRAVE v. TINDAL*, July 9, 1753, Lord Hardwicke held an estate charged by will with payment of debts, though it descended, subject to the charge, to an infant

tant heir, was equitable assets, and should be sold immediately without the parol demurring, the same as if it were devised to be sold, though the descent was not broken: for it descended subject to a trust for the creditors.—He therefore decreed the estate to the heir in trust for the creditors, and that it should be sold and the infants to convey when they came of age, unless they should shew cause to the contrary; in the mean time the purchasers to hold and enjoy.

[†] Page 137, line 2 from the bottom, in the text, instead of “when he declared he should be bound to carry the idea of equitable assets as far as he could,” it stands “when he held the equity of redemption of a mortgaged term to be equitable assets.”

[†] Page 139, Instead of the summary of Lord Camden's argument in giving judgment on the cause of *Silk v. Prime*, contained in the note, this correct report of it is given.

[†] Lord CHANCELLOR,—When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the cases, to see what general rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case.

Where trustees for the payment of debts are made executors the printed cases had ruled the assets to be legal.—This caused me to doubt; because, I had always understood the doctrine of this Court was the reverse, and, therefore, I thought it necessary to look back to the origin of this business, and to fix the principle.

Where an estate is devised to trustees for the payment of debts generally, it has long been the constant practice of the Court to pay all the debts *pari passu*. This is declared in the case *Woolestoncroft v. Long*, 1 *Cha. Ca.* 32. And the same is again laid down in 2 *Cha. Ca.* 54. Anonymous.

As the money, in these cases, never reaches the hands of the executors, no action lay: And the creditor was obliged to come into this court for satisfaction.

Whereupon equity, not being tied down to the rule of law, introduced a method of administration.—And, seeing the testator had made no distinction between the difference of securities given for the payment of debts, the Court conceived that the testator meant to do equal justice to all his creditors.

Nor did the Court, in this respect, do any injury to specialty creditors.—For, though real estates are assets, at law, to pay such debts, yet the creditors might be defeated by the debtor's will, or the heir's alienation.—So that where the will had set aside the law, equity would have forgot its own principle of equality, by giving a priority, which the testator had not done;—all debts being equal in conscience.

Upon this ground, the statute of fraudulent devises allowed devises for the payment of debts to be good, though the act annulled every other devise to the prejudice of specialty creditors.

This I consider as a parliamentary approbation of equitable assets; which, standing as it does, upon such ground of justice, the testator's intention, the rule of equality, and the sanction

function of the legislature, ought always to preponderate, in a doubtful case; and Sir Joseph Jekyll's opinion in *Coxe's case*, 3 *Wms.* 344. should be always remembered, who said, he would always do his utmost to extend the rule.

Where the trustee is not executor, the case is clear.—

Where the land is charged with the debts, it is clear likewise.—

But, where the testator put the trust into the executor's hands, there was a considerable doubt, how to distinguish the capacities of the two characters; as executor, the assets were legal; as trustee, they were equitable.

The law had determined, that where land was devised to be sold by executors, or devised to executors to be sold, in both cases the assets were legal.—In this respect, the law made no difference between the interest and the power; and that is evident. Any person who will peruse *Co. Litt.* 112. *b.* 113. *a.* with any attention, will be of that opinion, and all the cases in *Ro. Abr.* under that head, speak the same language.

These kind of devises had been so frequent at law, and the determination so uniform, that they seemed, for a time, to have over-powered the courts of equity; for I find that almost all the printed cases followed this rule, and made the assets legal.

So is *Girling v. Lee*, 1 *Vern.* 63. Anonymous. 2 *Vern.* 133. *Greaves and Powell*, 2 *Vern.* 249. Two strong cases in *Pre. Chancery*, *Clutterbuck v. Smith*, 127. *Bickham v. Freeman*, 136. *Bunbury*, 339. *Lord Masbam v. Harding*.

Lord King in the case of *Walker and Meager*, *Mof.* 204. which I don't well understand, avoided the point.

These authorities did perplex me exceedingly, for I had all my time, taken it for granted that the rule here was otherwise.

At last I find this note in Mr. Tracy's book, *Lewin v. Oakley*, 2 *Atkyns*, p. 50.

July 26th 1740. Devise to trustees for payment of debts, and the same persons are made executors.

The assets, said the Court, shall notwithstanding, be equitable and not legal. There are cases in *Vernon*, where it is held that debts in such cases shall be paid in a course of administration, but the modern resolutions have been otherwise.

I sent to the Register's book, and find, that was the very point of the cause; and, upon the Master's report, Lord Hardwicke determined that the simple contract, and the specialty debt should be paid *pari passu*.

The words of the will were: Testator devised his estate to *A.* and *B.* and their heirs in trust, to sell the same, and, thereout, in the first place, to pay his debts, and appointed them executors.

And now, I think the old rule is overthrown, and that wherever the land itself is devised to the same persons who are executors, the assets will be equitable.

And I hold the case to be the same whenever the land is devised to them, or to them and their heirs, for in both cases they are equitable trustees. The descent is broke, and the specialty creditors have lost their fund.

And

And I can hardly now suggest a case where the assets would be legal, but where the executor has a naked power to sell *quâ* executor.

What I have said shews that this Court has justly a partiality and predilection to equitable assets, which ought to turn the scale, in all cases where the matter hangs in equal balance.

This disquisition is, therefore, not proper ; though it must be admitted, that, in the present case, the trustees and executors have no more than a naked power ; for nothing is devised to them, and, therefore, the doctrine I have laid down is not directly applicable to this case : but two rules are obtained.

1. It is a good rule of expounding wills, to make them speak in favour of equitable assets, if it may be done.

2. That if you can lodge the assets in the hands of the trustees, the Court will never put them in the hands of the executors ; and when one person is invested with both characters, the trustee shall be preferred.

To come to the case,

1. The testator's will does most emphatically direct the payment of all his just debts.

I can never think, that a man who does, repeatedly, and so anxiously, provide for the payment of *all*, could ever mean, by legal preference, to pay some, and leave the rest unpaid.

2. The power is lodged not in executors solely, but in them or *their heirs* ; and it is clear that the money could never be assets in the hands of the executor's heir, nor could the creditor ever maintain his action against such heir.

Nor is it any answer to this objection, to say that the word heir is inserted by mistake or to be resembled to those cases where personal estate is given to a man and his heirs, or real estate to a man and his executors.

In those cases, the subject matter of the devise points out the proper succession and the literal will is nonsense.

But here, the word heirs has a useful and proper meaning, for it converts the executor into a trustee, and makes the assets equitable, which is a favourite point in this Court.

But it has been said, that the testator has here united both funds together in the hands of his trustees and executors ; and therefore both must be one consolidated fund, to follow the same course of administration.

For the words are, that they shall apply money arising from the real estate, together with the monies arising from his personal estate, to pay, &c.

The answer is, that in all cases, where the trustee and executor are one person, the funds are consolidated in the same manner : for, out of both, he is to pay all his debts.

But the course of administration is different ; and, by that very method, it is, that the Court is enabled to pay all the debts without distinction, as far as the assets will go, and, by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator.

3. This is the case of a charge upon the lands.

They are devised to the testator's wife and daughters subject to this charge.

In this respect it is a trust ; and no more to be sold than what is necessary for this purpose.

The power then to sell is merely consequential, the testator having named the executor for this purpose. The Court would have compelled the devisees,—Whoever sells to satisfy a charge must be a trustee, because a charge is a trust.

To make this still clearer,

The rents and profits, in the hands of the devisees, are assets before the sale. Legal assets they cannot be, for the executors have no right to receive them. They must therefore be equitable assets.

And, if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout.

Decree Affirmed.

[†] Page 140, end of the note is added

[†] See to the same purpose, *Batson v. Lindegren*, vol. 2. p. 94.

[†] Page 144, end of the case of *Harland v. Trigg*.

[†] According to the doctrine of this, several other cases have been decided, *Mason v. Low*, Tr. 8 Geo. 2.—*Hands v. Hands*, Rolls, 24 June, 1782. *Wynne v. Hawkins*, post. 179. *Nowlan v. Nelligan*, post. 489, and *Pierston v. Garnet*, post. vol. 2. p. 38. 226. with the cases there cited, in which the whole doctrine is investigated.

[†] Page 145, after *Kynaston v. Kynaston*, add “stated post. p. 457 n.”—and after *Anderton v. Cooke*, add “stated post. p. 456 note.

[†] Page 146, end of the case of *Samwel v. Wake*.

[†] See *Webb v. Jones*, Easter 1786, vol. 2. p. 60.

[†] Page 168, end of the case of *Chamberlyne v. Dummer*.

[†] See in addition the cases cited, *Perrot v. Perrot*, 3 Atk. 95. 1 Vez. 521. *Earl Bathurst v. Burden*, post. vol. 2. p. 64.

[†] Page 176, after allum work.

[†] *NEWTON v. NEWTON*, 1 *Cooke's Bankrupt Law*, 76. 2d edit.

[†] Page 177, line 10, after bankrupt.

[†] See the cases of *Patman v. Vaughan*, 1 *Durnford and East*, 572. and *Bartholomew v. Sherwood*, *ibid.* 573. as to the quantum of the trading.

[†] Page

[†] Page 180, *Bland v. Bland*.

[†] Cited and stated, vol. 2. p. 43.

[†] Page 182, after bill dismissed.

[†] See *Pierfon v. Garnet*, vol. 2. p. 38—226.

[†] Page 182; the last clause of the case of *Barnes v. Allen*, stands thus :—" It stood over till the first day of causes after term, when Lord *Chancellor* declared it to have vested in the two brothers (who survived the testator, but were since dead) as joint-tenants; and *Henry Allen* having survived *John*, the residue, subject to the wife's interest for life, belonged to the plaintiff, as personal representative of *Henry*."

[†] Page 186, end of the case of *Smith v. Guyon*.

[†] The same general doctrine had been laid down by the late Sir *Thomas Sewel*, when Master of the Rolls, in a case of *Tenant v. Jackson*, and *Cotton v. Everall*, the 10th of *February*, 1774; and he cited, in support of it, *Langley v. Lord Oxford*, the 11th of *May*, 1748. It was also adopted by Lord *Kenyon* upon a re-hearing of the former named cause.

In *Jebb v. Abbet*, the 9th of *February*, 1782, (cited by Mr. *Butler* in his note on *Co. Lit.* 290. the 14th edit.) Lord *Chancellor* said, where debts and legacies are charged on lands, the purchaser will hold free from the claim of the legatees, for, not being bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies which cannot be paid till after the debts: And in the case of *Beynon v. Gollins*, (reported, on a different point, *post.* vol. 2. p. 323. and cited in the same note by the name of *Beynon v. Gills*), the bill was dismissed, as to the purchasers, with costs, they not being bound, under the charge, to see to the application of the purchase-money.

[†] Page 239, towards the end of *Boddam v. Ryley*, after "discretion," it stands thus: "There are cases of arrears of annuities, where the Court has said something that looks like a latitude, and covered itself with that expression. My opinion is, that those cases will afford special grounds, upon which interest is demandable; I take it nothing but what arises from a contract, agreement, or demand of a debt, can give rise to a demand of interest, and this court, in those cases, follows a court of law. The decree must be, therefore, for payment of the money reported due by *Hunter*, and it must be referred to the Master to enquire into the value of rupees, and reduce them into sterling money."

[†] Page 260, line 22, after "the case in the Common Pleas does not so satisfy my mind, as to have enabled me to decide it without referring it to a court of common law."

[†] The

[†] The question, whether the reversion was assets of the person through whom it descended, to those in whom it vested in possession, was much agitated in the case of *Arundel v. Knight*, argued at *Lincoln's-Inn Hall*, 6 July 1787, when Lord Chancellor expressed his opinion to be against the case in the Common Pleas: but, as this case has not received his Lordship's final decision, no direct inference can be drawn from it.

[†] Page 265, the decree in *Hone v. Medcraft*, is given more at large from the minutes, as follows:—"His lordship, therefore, declared that the several legacies given by the testator's will to the poor of the parishes of *Whaddon Nash*, *Totenhoe*, and *Waverdon* were void, as being within the act of the 9th Geo. 2. intitled an act to restrain the disposition of lands whereby the same become inalienable; it was ordered that what was reported due for principal and interest of the testator's debts, and the subsequent interest to be computed thereon, and also what was already reported due for principal and interest of the several other legacies given by the testator's will, and the subsequent interest to be computed thereon, except the legacies of 1,000 *l.* each, given to *John Lord* and *Richard Filkes*, his executors, be raised by mortgage or sale of the testator's estate called *Whaddon Chace*, *Whaddon Park*, and other his lands subjected to the payment thereof, by the said testator's will, or of a sufficient part thereof, with the approbation of the Master: And it was ordered that the money so to be raised by such mortgage or sale should be applied in payment thereof accordingly; and, as to the legacies of 1,000 *l.* each, to *Lord* and *Filkes*, and the interest thereof, it was ordered that the same should be paid out of the residue of the said testator's personal estate. And it was declared that the lease of the rectory of *Whaddon*, and the lands and tythes thereto belonging having been surrendered by the testator, and a new lease taken thereof after the making of the said testator's will, that the same fell into, and was to be considered as part of the residue of his personal estate; and the accumulated rents of the estate at *Whaddon*, in the mean time, were ordered to be paid to the defendant *William Lowndes Selby*: and it was declared that the *Whaddon* estate, devised by the testator's will, in manner therein mentioned to the said defendant, was to be considered as belonging to him, and it was ordered that he should be let into possession, and that the title deeds should be delivered to him; and it was declared that the devise, in the testator's will, of the freehold and leasehold estates given to charities were void devises, as being within the 9th Geo. 2. and that the

leasehold fell into, and constituted part of, the residue of the testator's personal estate.†

[†] See the case of *Coppin v. Fernyhouse*, vol. 2. p. 291. where the gift being, as in this case, of a specific lease, was held to be adeemed by a subsequent renewal; though there being a codicil made after the renewal, that was held to be a republication of the will, and that the renewed lease passed thereby. But, in cases where the gift of the lease is not specific, the renewal is no ademption, therefore, where the words were "as to all and singular my leasehold estate, goods, &c." Lord *Hardwicke* said there was no doubt but the leasehold estate passed by the will; it was not a specific legacy, but an enumeration of the particulars of his personal estate. *Stirling v. Lydiard*, 3 *Atk.* 199.

[†] Page 267, at the end of the case of *Fidelle v. Evans*.

[†] Vide *Knox v. Brown*, vol. 2. p. 186.

[†] Page 270, the following addition is made to the case of *Russel v. Russel*.

"Upon the trial the jury found it was deposited as a security."†

[†] The reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord *Thurlow*, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the case of *Featherstone v. Fenwick*, May, 1784, and *Hurford v. Carpenter*, 17th and 18th of April, 1785, where Lord *Thurlow* held that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated; although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

[†] Page 286, the following addition is made to the case of *Foley v. Burnell*.

"An action of *detinue* was afterwards brought, in order to try this question again, in *B. R.* and a case reserved which was brought on in *Easter*, 1786. but the Court refused to hear an argument on a case which had been decided in the House of Lords. Upon a writ of error being brought in the Exchequer Chamber, that Court affirmed the judgment without hearing any new argument on a similar reason; and the House of Lords, on a writ of error there, affirmed that judgment also without argument."

[†] Page 289, at the end of the case of *Prideaux v. Prideaux*.

"This order was afterwards discharged by Lord *Thurlow*, with costs.

[†] Page 292, after *Villa Real v. Galway* add this note.

[†] The reporter having been favoured with a very accurate note of Lord Camden's judgment on the point of dower in this case (in which the former cases on the subject are considered) he has added it here.

Lord Chancellor stated the testator Mr. *Villa Real*'s will to be as follows:

"I give and devise to my dear wife one annuity or clear yearly sum of 200 *l.* of lawful *British* money, to be paid her by two equal half-yearly payments, &c. which annuity I give her during her natural life," &c. And subject to the payment of the said yearly annuity or yearly sum of 200 *l.* to my wife during her natural life, I give and bequeath all and every my messuages, cottages, &c. &c. and also my personal estate as herein aftermentioned, *i. e.* "I give and devise" in words comprehensive of all his real estate, "to trustees and their heirs, in trust to preserve and support the contingent uses and remainders from being defeated and destroyed, and for that purpose to make entries; yet, nevertheless to permit and suffer my daughter or her trustee herein aftermentioned, to receive and take the rents and profits of all and singular the premises to and for her proper use and benefit, and to let, set, and demise the same for the best rents, without taking any fines, for her natural life, and then in trust to the use and behoof of the heirs of the body of my said daughter, and in default of such issue, remainders over.

All the rest and residue of my ready monies and personal estate to Lord *Galway*, in trust to vest the same in the purchase of lands, to be conveyed to the trustees in trust, for the same uses, as before limited of his real estates.

If the annuity be behind or unpaid, his wife to enter on the said estates, or any part thereof, or into any estates to be purchased to distrain, &c. till arrears fully paid and satisfied."

The questions upon this will.

1. Whether Mrs. *Villa Real* is to take this annuity in satisfaction of dower out of her husband's real estate.

2. Whether Mrs. *Villa Real* is intitled to this annuity clear of the land-tax.

At the hearing of this cause, two cases were relied upon, by each side, upon the first point.

The first, the case of *Pitts and Snowden*, determined by Lord *Hardwicke*, where, upon a like will, he determined the widow to be entitled both to dower and annuity.

The other, the case of *Arnold v. Kempstead*, where Lord *Northington*, in a similar case, was of opinion, that the widow was entitled only to one, and put her to her election.

PITTS v. SNOWDEN was thus: Devise to his wife of an annuity of 50 *l.* a-year payable out of his copyhold and his freehold messuages, with clause of entry and distress; to be made good out of his personal estate. And, subject to the annuity, he gave his freehold messuages to his three children, &c.

ARNOLD v. KEMPSTEAD. Testator gave some leasehold estates to his wife for life, and then gave his wife 10 *l.* a-year, (20 *l.* whereof to be paid within twelve months after his decease)

decease) to be paid to her yearly, during her natural life, or so long as she should continue a widow, out of the rents and profits of his freehold estates in Queen's Square.

No clause of entry and distress.

But gave all his freehold estates in Queen's Square to his son, with remainders over.

The case now before the Court is more exactly correspondent, in the form of the devise, to *Pitts* and *Snowden*, than to the other case; for, in these two, there is an express clause of entry and distress, whereas there is no such power in *Arnold* and *Kempstead*; and they more perfectly resemble each other in another circumstance; as the annuity, in both, is charged upon other funds not subject to dower, as well as upon the dowable estate; whereas in *Arnold* and *Kempstead* the annuity is made to issue only out of the freehold estate subject to dower.

These two being alike in all their circumstances, I must admit, that *Pitts* and *Snowden* is an authority in point one way, *Arnold* and *Kempstead* the other.

The question upon this case is this:

1. Whether if a rent charge is given to the widow, issuing out of the estate subject to dower with power of distress, this devise shall operate as a bar or satisfaction of her dower.

I am of opinion that it shall: because the claim of dower 1st. disappoints the will, and 2d. is inconsistent with it.

It is admitted that every devisee must confirm the will *in toto*, if he claims any interest under it; and will, consequently, forfeit such interest, if he impeaches or intercepts any part of it.

In this case, the will is contradicted by the claim of dower. 1st. Because it puts the trustees out of possession; for they cannot hold the whole, subject to the annuity and distress, without being in possession of the whole: nor can the annuitant, consistent with the will, take possession of any part; because her right of entry into the whole puts her out of possession of the whole, till her right accrues upon default of payment.

And though the present case gives the right of entry upon the whole, or any part, in more explicit terms than *Pitts* and *Snowden*; yet the general power of entry and distress in *Pitts* and *Snowden* is tantamount in this particular.

The position, therefore, of the trustees, being co-extensive with the annuities and the distress, it is not possible, in such a case, to make the land subject to the dower, and the rent-charge at the same time, because

As annuitant, the widow must be out of possession of the whole; as doweress she must be possessed of a part.

Hence it follows, that where the testator gives the estate, subject to the annuity, as he doth in this case, he must be intended to give subject to the annuity *only*; and the residue of the rents and profits being given to the devisee, that devise must exclude all charges, except only the annuity.

In this view of the matter, the widow, by the claim of dower, disappoints the will in the most essential part of the testator's plan; by reducing the interest of the devisee, and loading the estate with an additional burthen.

2. The claim of dower is inconsistent with the will in another light, as it will diminish the annuity itself, which is contrary to the very words of the will.

The annuity is either given over and above the dower, or in satisfaction of it. He intended only one, or he intended both; if both, he intended both should be enjoyed in their full extent; the whole annuity and the whole dower.

Now can the widow enjoy the annuity, as the will has given it, if she claims her dower?

It is most clear that she cannot.

For if she enters into a third right of her dower, she must sink so much of her annuity as that third ought to bear in proportion. *That is a violation of the will*, and whether the annuity clashes with the dower, or the dower with the annuity, it is equally decisive, for she can never enjoy both, unless both can be reconciled to the will.

Nor is there any pretence to say that the whole annuity, by an equitable marshalling, shall be thrown upon the two remaining thirds; because that would, in terms, contradict the will, which charges the whole and gives the power of distress on the whole.

This is sufficient to shew the testator's intention; it is an intention that does not stand upon a loose presumption, but from the mode of devising in the will itself:—and then, the case comes within the rule of *Noys* and *Mordaunt*, that no person shall dispute a will that takes under it.

This rule is universal and without exception; and a dowress has no more right to be exempted from it, than any other devisee.

The cases of *Lawrence v. Lawrence*, *Hitchin v. Hitchin*, *Lemon v. Lemon*, &c. may be all admitted to be good law; the will, in all these cases, being consistent with the claim of dower.

In all these cases the dowable estate was devised generally; and, as the testator had not expressed the wife's bequest to be in satisfaction, the Court would not presume it, and the estate passed *cum onere*.

There, no violence is done to the will; and the wife takes no more from the devisee than the testator intended she should; nothing being declared to the contrary.

But where the dowable estate is so divided that the claim of dower makes a material change in the will itself, as it does here, the widow must be barred, by necessary implication. For where is the difference between declaring she shall not hold both, and devising so that she cannot hold both without disturbing the will?

And, therefore, if the claim of dower will disappoint the will, she is barred of her dower by necessary implication; which will, according to the doctrine of all the cases, be equivalent to an express declaration.

I will

I will now say a word upon the case of *Arnold and Kemstead*.

There is no power of distress in that will, and yet I do think it substantially within the reason of the other two cases; for the very gift of an annuity to the wife out of the dowable estate, does, from the nature of the interest, throw her out of possession and makes the claim of dower inconsistent with the will.

I must not conclude, without taking notice of a circumstance, that may be urged against my opinion, as a proof of intention in the testator to give both dower and annuity to the wife. And that is, that the annuity is made to issue out of more than the dowable estate, from whence it may be argued that the testator enlarged the fund for payment, in order to leave sufficient for the satisfaction of both the demands.

I answer, 1st. That it is totally unknown whether he extended the charge and the remedy with that view: it is at most but conjecture; and it may as reasonably be supposed that he meant only, by augmenting the security, to give an easier and safer remedy for recovering the annuity; as nothing is more common, where a rent-charge is granted, than to charge an estate of ten times the value for the payment of it.

Secondly, That this supposed intention is rebutted by a declared intention to the contrary, manifested and expressed in the will itself.

I wish these cases could have been reconciled, feeling in myself a modest unwillingness to sit in judgment upon two men greatly superior to myself in learning as well as capacity: but that, which, in a private man, would have been presumption, is an indispensable duty in a judge; the tax is imposed upon me by my office, and I undertake it with more ease of mind, knowing that there is a jurisdiction superior to us all, which is able to confirm or reverse my opinion by a final decision.

[†] Page 301, end of the case of *Holme v. Monkhouse*.

[†] The cases of *Holcroft v. Pbitton*, at the Rolls, May 24, 1784, and *Benyon v. Madisson*, (*post. vol. 2. p. 75*) support the doctrine of this case, with which the latter is in point. There has been a subsequent case in the Exchequer, *Hamilton v. Sneyd*, which has received a similar decision; and where the case of *Norris v. Huthwaite* was again reprobated.

[†] Page 303, end of the case *Cator v. Lord Bolingbroke*.

[†] *This order of dismissal was affirmed on a re-hearing before Lord Thurlow, 18th December 1787. Vide post. v. 2. p. 282.*

[†] *Ibid.* end of the case of *Lawson v. Barker*.

[†] Same point, so held, in *Love v. Jacomb*. *Hill. 1776*.

[†] Page 311, end of the case *Warren v. Warren*.

[†] See on this subject the case of *Hanbury v. Hanbury*, *post. vol. 2. 352—529*.

[†] Page 312, the following addition is made to the note.

[†] See also the case of *Hughes v. Doulsen*, *post. vol. 2. p. 614*, where Lord Thurlow differed in opinion, on this subject, from Lord Loughborough.

[†] Page 336, (7th line from the bottom) after "*Shepherd v. Shepherd*"

[†] Reported (by the name of *Gilson v. L. Montford*) 1 *Versey*, 485.

[†] Page 352, l. 16, after "*Berkshire*,"

[†] The estates called in the former part of the case the *Oxfordshire* estates, were found to contain some farms in *Berkshire*.

[†] Page 362, end of the case of *Newton v. Bennett*.

[†] See *Ekins v. E. I. Company*, 1 *Wms.* 395. also *Perkins v. Baynton*, *post.* 375, *Treves v. Townshend*, *post.* 384. *Foster v. Foster*, *post.* vol. 2. p. 616. and the Earl of *Lonsdale v. Church, Rolls*, 17th December, 1789, where the receiver of the duties in the harbour of *Whitehaven*, having a yearly salary, was decreed to pay interest made of balances from time to time in his hands, and laid out by him on securities.

[†] Page 375, the following addition, is made, to the text, at the end of the case of *Kinchant v. Kinchant*.

"The son rejecting this compromise, Mr. Justice Gould was of opinion, there was not sufficient ground for the Court to interfere, and dismissed the bill without costs; which order was inrolled; and upon an application, by the plaintiff, to discharge the inrollment, the Court did not incline so to do: but, at length, to avoid an appeal, the parties came to a compromise."

[†] Page 385, l. 3, after "enquiry",

[†] Vide *Forbes v. Ross*, vol. 2. p. 430.

[†] Page 387, the following addition is made to the marginal abridgment.

Where the parent is reported not of ability, the sums allowed shall be only from the time of the report, not of the decree.

[†] Page 388, end of the case add "to Dr. Kennedy, who was reported not of ability to maintain his children; but although the Master made the allowance from the date of the decree, the Lord Chancellor confined it to the date of the report.

[†] *Ibid.* end of the case of *Sawyer v. Bowyer*.†

[†] In *Vaughan v. Lloyd*, 1 February 1787, it was held, that witnesses examined before hearing, cannot be examined upon a commission afterwards without leave.

[†] Page 392, end of the note of *Foy v. Foy*, cited at the end of that of *Hookey v. Hatton*.†

[†] In this case also, there were three legacies given in the will and codicils to Dr. *John Jebb*, and his Honor thought him entitled to them all; but he refused to take more than one.

[†] Page 393, end of the case of *Ridges v. Morrison*.

[†] The doctrine of this case has been relied upon, and similar decisions made in *Reay v. Hopper*, *Rolls, Mich. 1785*, and *Jackson v. Jackson*, *June 23, 1788*.—The principles of it are also admitted in *Campbell v. Earl of Radnor*, *ante 271*. and *Coot v. Boyd*, *vol. 2. p. 521*. though, under the circumstances of those cases, the legacies were not held to be accumulative.

[†] Page 398, after "*Corp. 473*," in the note.

[†] The point in this case is now *sub lite*, in the Court of *Exchequer Chamber*.

[†] Page 418, end of the case of *Whitbread v. Brockhurst*.

[†] See *Whitchurch v. Lewis*, *post. vol. 2. p. 559*.

[†] Page 419, the conclusion of the note of *Hardy and Martin*, stands thus.

[†] The injunction was continued, and an issue directed, when the jury gave a verdict for the plaintiff (defendant in this Court) with 1*s.* damages.

[†] Page 419 n, to the note of *Vaux v. Lord Waltham*, is added.

[†] "Where, however, the Lord *Chancellor* seemed inclined to grant the motion if the affidavit had clearly shewn it to be a mistake."

[†] Page 427, end of the case of *Grave v. Earl of Salisbury*.

[†] The question of satisfaction has been several times since before the Court; especially in the cases of *Powel v. Cleaver*, *post. vol. 2. p. 499*. and *Rickman v. Morgan*, *post. vol. 2. p. 394*.

[†] Page 438, the last paragraph of *Hall v. Smith*, stands thus.

"Lord *Chancellor* thought, the costs having been taxed, this case was not within the general rule, and made it certainly matter of revivor; if they had not been taxed he might have laid hold of the circumstance of their having been ordered to be paid into the bank as taking the case out of the rule: and therefore over-ruled the plea."

[†] Page

[†] Page 444, end of the case of *Nightingale v. Lawson*.

† In *MAXWELL v. ASHE*, Nov. 6. 1752. An annuity for life was given out of leasehold, and the annuitant was held not to be bound to contribute to the expence of the renewal.—See also the case of *Stone v. Theed*, v. 2. p. 243.

[†] *Ibid.* after “*Brodie v. Duke of Chandos*.”

† *BRODIE v. Duke of CHANDOS*, 14th December, 1773.—*Ann Thistlethwaite*, being possessed of a considerable personal estate, by will dated 23d. September 1740, gave to trustees all her ready money, &c. (subject to her debts) to lay out and expend the same in the erecting and new building of a neat parsonage house, *which her will was, should be erected at the upper end of the garden belonging to the said parsonage house*, to be from time to time, had, occupied, and enjoyed by the then present and other future incumbents; and made *Robert Thistlethwaite* her nephew, sole executor. The testatrix died without revoking the will, leaving the said *Robert Thistlethwaite* and his brother next of kin. The Honourable *Stephen Fox* becoming seized of the perpetual advowson of the living, and having presented the plaintiff thereto, he filed a bill against the defendants the representatives of the said *Robert Thistlethwaite*, and the then next of kin, (*Robert* and his brother being both dead) to recover 600*l.* or the residue of the personal estate of *Ann Thistlethwaite* for the purpose of building the house.—The cause was heard before Lord *Bathurst*, 14th December, 1773, and the question being whether this was within the meaning of the statute of *Mortmain*.—Lord *Chancellor*, 25th January, 1774, pronounced his decree in favour of the charity, no land being to be purchased. The account of the personal estate being waived, he ordered the 600*l.* to be paid with interest for that purpose, and all the parties to have their costs out of the fund.

[†] *Ibid.* after “*Attorney General v. Hutchison*.”

† *ATTORNEY GENERAL v. HUTCHINSON*.—*Mary Glover*, by will dated 24th September, 1761, directed that 1,500*l.* *should be forthwith paid and laid out*, under the direction of the Minister and Churchwardens of *Roxton* for the time being, for the purpose of erecting and building a free-school at *Roxton*, for 12 poor boys and 12 poor girls of the said parish; and she directed, that as soon as the school should be built, 2,000*l.* should be placed out at interest, and the dividends from time to time paid to the Minister and Churchwardens, for ever, for the purposes following, *i. e.* 30*l.* per annum, part thereof, she directed should be paid for a schoolmaster, for teaching the said boys to read and write, and 30*l.* per annum to a school-mistress, to teach and instruct the said girls, in reading, writing, and plain-work; to continue untill they should be of proper age to be put out apprentices; and the surplus of the interest of the 2,000*l.* she willed and directed *should be applied in and about the repairs of the said free-school, &c.* and appointed the defendants executors. Upon a bill being filed, the defendants contended, that the testatrix having given the 1,500*l.* to be laid out in building a school, and the 2,000*l.* being dependent upon it, the whole was void; and the Lord *Chancellor* (*Bathurst*) 26th May, 1775, dismissed the information as to the 1,500*l.* for building the school: The testatrix not having pointed, by the will, to the land which the parish had, and the *Chancellor* thinking there was no ground to presume she meant it; and if the school which there was already, was given by the lord of the manor, it was not to be converted to other purposes.

With respect to the point in the cases cited, some other cases have been decided which may be worthy the reader's notice.

ATTORNEY GENERAL V. TYNDALL,—*Mary Parker*, by will taking notice that she stood possessed of leasehold premises, devised all and singular her lands and tenements to trustees, to sell the same, and willed that part of the money should be laid out in the purchase of a competent piece of ground for building an alms-house, and directed that not more than 1,400*l.* be laid out therein, and ordered the residue of her personal property should be laid out in the purchase of lands, &c. and the rents to be paid to twenty persons, who should be admitted into the alms-houses.

10th *December*, 1759, Sir *Thomas Clarke* declared the devise of the freehold and leasehold estate void.

24th *June*, 1761, On further directions, his Honor declared in case the trustees could obtain a gift of a competent piece of ground, the charity would be entitled to have the leasehold and personal estate so marshalled as to throw the debts and legacies on the leasehold, in order to have the mere personal estate applied to the charity.

But on appeal, this decree was reversed by Lord *Henley*, 11th *June*, 1763, and the personal estate ordered to be distributed among the next of kin.

PELHAM V. ANDERSON, 11th *December*, 1764.—Testator directed his executors should build and erect an hospital, for which purpose he charged his personal estate with 2000*l.* Residue to same uses as real estate.—The bequest of 2000*l.* was declared void by the statute of Mortmain.

ATTORNEY GENERAL V. BISHOP OF OXFORD, and others, 13th *July*, 1786.—*Thomas Sims*, the testator, by his will, after devising his freehold and leasehold estates therein-mentioned, and charging the same with the payment of certain annuities in manner therein-mentioned, bequeathed and disposed of his personal estate in the words following, (that is to say) “I give and bequeath to my executors the sum of 100*l.* each, for their trouble in executing my will; and all the rest and residue of my personal estate, I give and bequeath to them, in trust, to apply the same to build a church at *Wheatley* where the chapel now is, in such manner as I shall hereafter direct, or for want of such direction, as my executors shall think best.

The information prayed a general account and directions touching the plan and execution of the charitable bequest given by the testator.

The Bishop of *Oxford*, as patron and parson of *Cuddeston*, by his answer, opposed the erection of a new church, unless the surplus of the residue could be applied towards an augmentation of the endowment of the chapelry annexed: The chaplain and chapel-warden answered to the same effect, and proposed repairing the old chapel, and, with the surplus, augmenting the salary of the chaplain, &c.

The next of kin insisted, that a new church or chapel must be built, and the surplus, if any, divided among them.—As to the repairing, or augmenting the salary of the chaplain, &c. they opposed that plan, insisting that the intention of the testator must be implicitly followed; in case the bishop did not allow of a new chapel, that the bequest should be void, and the money divided.

Sir *Lloyd Kenyon*, Master of the Rolls, sitting for Lord *Chancellor*, observed, that if the bishop objected, he could not interfere in the matter: As to repairing, &c. he could not do that.—The intention must be implicitly followed, or nothing could be done.

However, he referred it to the Master to take an account, &c. and to make a special report as to the plan of erecting a new chapel, and the expences attending it; and also with respect to the bishop's assent for that purpose.

[†] Page 449, at the end of the case of *Coote v. Coote*.

[†] *V. post. vol. 2. p. 521.*

[†] Page 451, at the end of the case of *Pocklington v. Bayne*.

[†] This point has been since more amply discussed in the case of *Robinson v. Hardcastle*, *post. vol. 2. p. 22.—344.* also 2 *Darnford* and *East's Term Rep. p. 241—781.*

[†] Page 452, at the end of the case of *Sherwood v. White*.

[†] *Vide post. Acton v. Market, vol. 2. p. 14. Culling v. Hickling, vol. 2. p. 182.* and the cases there cited, by which the rule seems to be completely settled, as here determined.

[†] Page 454, at the end of the case of *ex parte Hayden*.

† *Vide Cooke's Bankrupt Laws, 292, S. C.* also the case *Ex Parte Hodgson, post. vol. 2. p. 5. Ex Parte Martin, post. vol. 2. p. 14. Ex Parte Page, post. vol. 2. p. 119. Ex Parte Flintum, vol. 2. p. 120. Ex Parte Copeland, Cooke's Bankrupt Laws, 295.* and the other cases cited by him in his section of joint debts.

[†] Page 467, at the end of the case of *D. of Ancafter v. Mayer*.

[†] See, on this subject, the cases of *Parsons v. Freeman,—Lewis v. Nangle,—Forrester v. Leigh,—Perkins v. Baynton,—Wilford v. Earl of Darlington,—Shafto v. Shafto,—Basset v. Percival,—*all cited and stated by Mr. Cox, in his note on 1 *Wms. 664.*—also the cases of the Earl of Tankerville *v. Fawcett, post. vol. 2. p. 57.—*and *Tweddel v. Tweddel, post. vol. 2. p. 101.—152.*

[†] Page 468, in the text, after “their being prepared for wear if not worn” it stands thus, “and directed an enquiry to be made with respect to the jewels being worn.”

“On the Master's report that they were occasionally worn, the cause came on before his Honor, sitting for the Lord Chancellor, who was of opinion that that circumstance made the difference.”

Dismissed the Bill.

[†] Page 482, l. 4, after “surrender them.”

[†] The cases on this subject are collected in Mr. Cox's note, in his edition of *P. Wms. vol. 3. p. 360.*

[†] Page 492, at the end of the case of *Nowlan v. Nelligan*.

[†] *Vide Pierfon v. Garnet, post. vol. 2. p. 38—226.*

[†] Page 496, at the end of the case of *Parker v. Wells*.

From this Judgment of reversal the plaintiffs appealed to the House of Lords, where the case being argued, the following questions were put to the Judges.

1. Whether the finding be sufficient whereupon to give final judgment.
2. If the finding be insufficient, what award ought to be made on such finding?
3. If the finding be sufficient, whether, upon such finding, the plaintiff in error appears to be a trader within the meaning of the statutes concerning bankrupts.

On *Tuesday* 15th of *March*, 1787, the Lord Chief Baron delivered the unanimous opinion of the Judges present, upon the 1st. question, in the negative; and upon the 2d. question, that a *Venire facias de novo* ought to be awarded.

Whereupon it was ordered, that both the judgments should be reversed, and the special verdict (being insufficient) should be annulled, and that the Court of King's Bench should award a *Venire facias de novo*, and proceed according to law.

The plaintiff did not proceed on the *Venire facias de novo*, but brought a fresh action in the Common Pleas, which was afterwards dropped, and an action brought in the King's Bench, which was tried before Mr. Justice *Buller* and a special jury, 7th of *December*, 1787, the jury found a special verdict, but it appearing that the plaintiff had left off brick-making at the time when the petitioning creditor's debt accrued due, the defendant waived the special verdict, and a general one has been entered for the plaintiff. See 1 *Cooke's Bankrupt Law*, (2 edit.) 67.

F I N I S.

Early mention of Mr. Justice Buller as a member of the Council P. 290. N
319. in 1780. 319. N
364. in year 1784. 304. N
314. N



